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Supreme Court, U.S.
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No.

In The

Supreme Court Of The United States

October Term 1998

IRMGARD LIPCON, MITCHELL LIPCON, CHARLES R. LIPCON and BARBARA LIPCON,

Petitioners,

vs.

UNDERWRITERS AT LLOYD'S LONDON a/k/a the CORPORATION OF LLOYD'S a/k/a SOCIETY OF LLOYD'S; a/k/a LLOYD'S OF LONDON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES LIPCON
2480 One Biscayne Tower
Two S. Biscayne Blvd.
Miami, Florida 33131
Telephone: (305) 373-3016

SHARON L. WOLFE
Counsel of Record
COOPER & WOLFE, P.A.
200 S. Biscayne Blvd.
Suite 3580
Miami, Florida 33131-2316
Telephone: (305) 371-1597

Counsel for Respondent

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QUESTIONS PRESENTED FOR REVIEW

Whether the anti-waiver provisions of the United States securities laws preclude enforcement of certain choice-of-law clauses in international agreements?

Whether the Eleventh Circuit's conclusion that spouses were bound by choice of law clauses they did not sign and to which they did not agree conflicts with this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995)(aff'g 19 F.3d 1503 (3d Cir. 1994))?

PARTIES TO THE PROCEEDING

The following persons and entities have an interest in the outcome of this case:

Irmgard Lipcon
Charles R. Lipcon
Mitchell Lipcon
Barbara Lipcon
Underwriters at Lloyd's London a/k/a
the Corporation of Lloyd's a/k/a Society of Lloyd's a/k/a Lloyd's of London

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PETITION FOR WRIT OF CERTIORARI

Petitioners Irmgard Lipcon, Mitchell Lipcon, Charles R. Lipcon and Barbara Lipcon petition for writ of certiorari to review the decision of the United States Eleventh Circuit Court of Appeals which affirmed the judgment of the United States District Court for the Southern District of Florida.

CITATIONS OF OPINIONS BELOW

The opinion is reported at *Lipcon v. Underwriters at Lloyd's, London,* 148 F.3d 1285 (11th Cir. 1998). The district court's order is unreported and is reproduced here in the Appendix at A-33.

STATEMENT OF GROUNDS FOR INVOKING JURISDICTION

Jurisdiction in this Court is sought pursuant to 28 U.S.C. § 1254 to review the United States Court of Appeals for the Eleventh Circuit's judgment entered August 5, 1998.

The district court's subject matter jurisdiction over federal law claims was invoked under 15 U.S.C. § 77v, Securities Act of 1933 § 22(a); 15 U.S.C. § 78aa, Securities Exchange Act of 1934 § 27; 18 U.S.C. § 1964(c)(Racketeer Influenced and Corrupt Organizations Act); 28 U.S.C. §§ 1331 & 1332(a). Petitioners are citizens or residents of various states in the United States and Respondents are citizens or subjects of a foreign state. The amount in controversy exceeds $50,000 exclusive of interest and costs.

STATUTORY PROVISIONS INVOLVED

change Acts are at issue here.

> 15 U.S.C. § 77n, Securities Act of 1933 § 14
>
> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.
>
> 15 U.S.C. 78cc(a), Securities Exchange Act of 1934 § 29(a)
>
> Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

STATEMENT OF THE CASE AND FACTS

I. Presentation of federal questions below.

This is a civil case which arises out of a judgment rendered by the United States District Court for the Southern District of Florida, affirmed by the United States Eleventh Circuit Court of Appeals. The federal questions presented were timely raised in the district court: (1) whether the anti-waiver provisions of the United States securities laws preclude enforcement of certain choice-of-law clauses in international agreements? and (2) whether the Eleventh Circuit misconstrued this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) when it held that the spouses of the signatories to the contract were bound by the

choice of law provisions they did not sign?

II. Introduction.

Lloyd's came to the United States and solicited thousands of individuals, including the Lipcons, to invest in insurance syndicates. Lloyd's made numerous misrepresentations to these individuals to get their money to cover substantial losses it was about to incur from asbestos and pollution claims. These misrepresentations violated the registration and anti-fraud provisions of the federal securities laws. Insiders at Lloyd's knew about the asbestos claims; the newly-solicited United States investors did not have a clue. After Lloyd's obtained substantial investments, and before information about the losses became public, Lloyd's convinced Parliament to exempt it from English securities laws. Lloyd's then made all previous United States investors sign another agreement which required any litigation to be brought in English courts under English law - a substantial change from the initial agreement and one which completely eliminated the investors' rights under United States law. See generally (R5-108-2-9). But the United States securities laws have simple, straightforward anti-waiver provisions: any agreement to waive compliance with those laws is void. The Lloyd's agreement should have been void. But the district court dismissed the case. It enforced the choice of law provisions. The Eleventh Circuit reluctantly affirmed.

III. Facts and procedural history.

A. Lloyd's generally. Lloyd's is an unincorporated association composed of individual members called "Names" who underwrite insurance pursuant to Lloyd's' rules and procedures. There are two categories of Names:

Working Names, who are insiders employed by Lloyd's; and External Names, who are passive investors. The United States individuals Lloyd's solicited in this case were External Names. (R5-108-12 ¶ 21).

Lloyd's is self-regulating. Underwriting members are exempt from the English Insurance Companies Act and Lloyd's is exempt from the English Financial Services Act, a disclosure law similar to United States securities laws. (R5-108-4-5 n.1).

Names are solicited to join Lloyd's by Members' Agents. (R5-108-12 ¶ 23). The Name must then select an agent through whom all of their business is conducted. Those agents also advise them on syndicate selection each year. (R5-108-13, 15 ¶¶ 25, 34). Most Names select the soliciting agent as their Members' Agent. That is what the Lipcons did. (R5-108-12-13 ¶ 24).

Once an individual becomes a Name, she or he must sign a series of non-negotiable agreements, including a General Undertaking and Deed of Trust in favor of Lloyd's. (R5-108-20 ¶ 49). The General Undertaking is a master agreement in which Lloyd's imposes obligations on the Names during the entire course of their investment. Names must also execute documents which govern their relationships with their agents and other Names. (*Id.* ¶ 50).

Each Name determines the amount of underwriting she or he wishes to undertake each year. She or he then puts up funds at Lloyd's, typically a letter of credit, to support the chosen level. (R5-108-27 ¶¶ 66, 67). However, the Name's actual liability is effectively unlimited and may well exceed the amount of the letter of credit. In fact, during the relevant

period of this suit, Names placed their entire net worths at risk. (R5-108-12, 46, 47 ¶¶ 22, 112, 114).

Names are grouped together annually to form syndicates for the year. Each Name is individually/severally responsible for her share of the risk. Each syndicate is managed by a Managing Agent who employs brokers. (R5-08-13,15-16 ¶¶ 25, 26, 33, 34).

A syndicate year of account (SYA) operates on an annual basis as to the risk accepted. But it generally remains "open" for three years to process all premiums and claims received for the insuring year. Traditionally, each SYA was closed at the end of three years by reinsurance from a succeeding SYA. The amount of premium to close is determined by the managing agent from whom the premium is collected when reinsurance is obtained. The agent must fully disclose all material facts about the risks to be re-insured so the Names who underwrite the reinsurance in any subsequent SYA are paid an adequate premium. If Lloyd's cannot quantify any outstanding liability in an SYA with sufficient accuracy to ensure there are adequate reserves and an adequate premium it should not close the SYA. Lloyd's had an obligation to assure adequate disclosure of the open accounts, i.e., long-tail risks, to Names. (R5-108-16, 17 ¶¶ 35-39).

B. The Lipcons become Names. Lloyd's' agents came to the United States to solicit members. (R5-108-18 ¶ 44). In 1983, Lloyd's, through its agent Barder & Marsh, solicited Irmgard Lipcon to become a Name. (R1-1 Ex. B 3/29/96 Aff. of Charles Lipcon ¶ 4; Aff. of Mitchell Lipcon ¶¶ 3, 4) The Lipcons were introduced by an insurance broker in Miami. They all had several lunch and dinner meetings in Miami to discuss her membership. (Id.).

After Irmgard became a Name, Barder & Marsh regularly came to Florida to discuss her underwriting from 1984 to date. The same was true for Mitchell. (R1-1 Ex. B Aff. of Charles Lipcon ¶ 11; Aff. of Mitchell Lipcon ¶ 11).

The Lipcons also had substantial contacts with Lloyd's from their residence in Vail, Colorado. (R1-1 Ex. B Aff. of Charles Lipcon ¶ 16A).

C. The fraudulent scheme. After hundreds of years of respectable business dealings and profitable operations, Lloyd's discovered, beginning in the late 1960's, problems in its internal operations and finances. Its response was less than forthcoming: Lloyd's tried to hide the problems and tried to find innocent investors to cover the losses. There were several areas of fraud: (1) the Cromer report on internal operations; (2) staggering asbestos and pollution losses; (3) Lioncover, the cover-up of a managing agent's fraud; (4) L M X spiral, the ultimate reinsurance cover-up; and (5) Lloyd's misdealings in the monies the Names deposited in Lloyd's American Trust Fund.

(1) The Cromer report. In 1968, Lloyd's put together the Cromer Report, which disclosed material problems in Lloyd's' operations, including a decline in underwriting standards and a conflict of interest between brokers and underwriters. Lloyd's did not disclose this report to the Names it solicited in the United States. (R5-108-30-33 ¶ 73). The Lipcons were unaware of the report. (R5-108-33 ¶ 74).

(2) Asbestos liability. In the late 1970's, Lloyd's became aware of the potential flood of asbestos litigation. It had underwritten a substantial portion of the risks

in the United States market in the 1950's. By the mid-1960's and 1970's, Lloyd's became aware of the link between inhalation of asbestos and diseases in asbestos workers. (R5-108-33-34 ¶¶ 75, 76). Around 1980, Lloyd's established an Asbestos Working Party to deal with these claims. It discovered the claims would be huge. But it decided to cover up the scope of the exposure. (R5-108-35, 36, 37-38 ¶¶ 81-84, 87). As a result, Names ended up unknowingly reinsuring asbestos liability. (R5-108-38 ¶ 88).

In 1995, the House of Commons Treasury and Civil Service Committee found this nondisclosure improper.

> An efficient regulator, even if it did not have detailed knowledge of the scale of the losses arising from this source, should have warned potential investors in Lloyd's of the existence of specific risks. This did not happen and some Names ended up paying for losses, the existence of which, if not the scale was apparent to some participants in the Market, who managed their affairs, before the Names joined.
>
> * * *
>
> Significantly the conclusions of the Working Party were not revealed to external Names . . . . the lack of knowledge over the scale of long-tail losses does not absolve an efficient regulator from insuring the disclosure of the existence of such risks and evidence suggests that such disclosure did not fully occur.

(R5-108-38-40 ¶ 89-90)(emphasis deleted).

Worse yet, some Names, including the Lipcons, specifically told their agents they did not want to underwrite asbestos liability. The agents told these Names they would not be in such syndicates; that was not true. Those Names were unknowingly included in underwriting asbestos liability. (R5-108-40 ¶ 91-92; R1-1 Ex. B Aff. of Charles Lipcon ¶ 5, 18; Aff. of Mitchell Lipcon ¶ 6, 18).

(3) **Lioncover.** In the early 1980's, a Lloyd's managing agent was involved in a fraud that resulted in massive losses to certain syndicates. Lloyd's created Lioncover Insurance Company, Ltd. to settle the dispute with the Names in these syndicates and to reinsure the outstanding liabilities. Lloyd's actively failed to disclose to Names material information about this fraud and the unquantifiable liability claims placed in Lioncover. The practical effect of the manner in which Lloyd's set up Lioncover was that Names became jointly liable for the liabilities reinsured through Lioncover, though Lloyd's had always represented that its members' liability would be several only. (R5-108-40-43 ¶¶ 93-99; R5-119-2 ¶ 5).

(4) **LMX spiral.** Lloyd's developed this new investment product in the mid-1980's; it was simply re-insurance of re-insurance. No single managing agent could know what risk a particular syndicate assumed. It virtually guaranteed that all Names would participate in asbestos risks. And, by passing claims through successive syndicates multiple times, Names would be obligated to pay the claims multiple times. Lloyd's cannot verify the amounts requested to pay such claims and has failed to provide material information to Names so they can determine the nature and extent of

their liabilities. (R5-108-43-44 ¶¶ 100-05).

(5) Lloyd's American Trust Fund. Lloyd's has to hold certain premium income in trust so that it can underwrite insurance risks in the United States. The Deed of Trust required Lloyd's to account individually for the funds. It has not; the funds of all Names are commingled. Where funds were unavailable to meet the obligations of some individual Names, Lloyd's "borrowed" funds held in trust for other Names. The Deed of Trust did not permit such borrowing. The commingling and borrowing were breaches of fiduciary duty. As a result, Names have been saddled with joint liability for other Names' losses. (R5-108-44-46 ¶¶ 106-11).

Many Names were placed in SYA's that had long-standing asbestos exposure buried in layers of reinsurance. The Names are trapped in potentially unlimited liability, even if they resign their membership in Lloyd's and even if they die. (R5-108–17-18, 46-49 ¶¶ 40, 41, 112-17).

At the meetings the Lipcons had with the agent before they became Names, Charles Lipcon specifically asked Sam Barder and Derek Wills about potential problems with asbestos claims. Barder and Wills told him there were no problems because the limits of the policies that covered asbestos were exhausted and the effect on Lloyd's of any unpaid claims would be insignificant. Agents repeated the same information over the ensuing years. (R1-1 Ex. B Aff. of Charles Lipcon ¶ 5, 18; Aff. of Mitchell Lipcon ¶ 6, 18).

Lloyd's repeatedly represented to the Lipcons that it operated under a standard of "utmost good faith." This was not true. (R5-108-9 n.2). Lloyd's knew it had massive un-

reported losses for asbestos and pollution claims. It hid those losses. It successfully lobbied to change English law to exempt Lloyd's from the Financial Services Act, a law which regulates business standards and conduct and requires disclosures similar to United States securities laws. Before the massive asbestos and pollution claims were declared, insiders at Lloyd's were able to get out of the syndicates and put new investors on the risks by reinsuring them from the years in which the insiders had participated to the new years in which the new investors would participate. (R5-108-4-6).

D. Fraud and overreaching in the choice clauses. In 1986, Lloyd's drafted a revised General Undertaking, a one and a half page document The only matters of substance in this document were the choice clauses. The first half page contained recitations about the parties and the consideration. The first paragraph of the agreement stated that the member would comply with all relevant English legislation. The second paragraph stated that the parties' rights and obligations would be governed by the laws of England. The third paragraph was a choice of law clause.

> The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

(R5-119 Ex. C). The fourth paragraph stated that the choice of law and jurisdiction clauses continue in full force even if a Member stopped underwriting. (Id.).

These clauses were not in the agreements the Lipcons originally signed in 1983 and 1984. (R5-119 ¶ 9). The original agreements only provided for arbitration in London. And those arbitration clauses did not apply to disputes against Lloyd's itself. (R5-119 ¶ 9 & Ex. A).

All Names, regardless of when they became members, had to execute the revised General Undertaking, and a new Premiums Trust Deed, as a condition of their continued membership. They could not negotiate any of its terms. Lloyd's specifically threatened Mitchell Lipcon and Irmgard Lipcon that they could not continue as investors in Lloyd's if they did not sign these clauses. (R5-108-6-7). See also (R5-108-22 ¶ 53).[1/] The Lipcons had already invested much time, money and effort into becoming Names. They did not want that to be wasted. (Id.). See generally (R1-20-4). A Name could not simply withdraw entirely from Lloyd's. Lloyd's would retain all funds paid, including letters of credit established, until the withdrawing Names paid all their accounts and substantial "winding up fees." (R5-108-17-18, 22 ¶¶ 41, 54). The Lipcons executed the revised General Undertaking in 1986. (R5-119 ¶ 9).

1/ Lloyd's also fraudulently told the Lipcons the purpose of the documents was "to bring the agreements into line with . . .the new Lloyd's legislation" and some of the new provisions were "mainly of a technical nature" which would "not affect them greatly on a day to day basis." (R5-103-3-4 ¶ 4). The provisions were far from "technical." The choice clauses deprived the investors of all their rights under United States laws. It gave the investors no rights under English law either. And the only new law on the books was the Financial Service Act, from which Lloyd's was exempted. (R2-51). The Act did not refer to choice of law clauses. The clauses were not necessary to "bring the agreements into line" with any new legislation.

The State of Colorado issued a temporary injunction against Lloyd's to prevent it from calling letters of credit.[2/] (R1-1 Ex. B Aff. of Charles Lipcon ¶ 16A & Ex. 5)(transcript of Colorado injunction order). Similar restraining orders were issued in Ohio, Arizona, Illinois, California, Missouri, West Virginia and Pennsylvania. See (R1-1 Ex. B Aff. of Charles Lipcon ¶ 16A, B; Aff. of Irmgard Lipcon ¶ 5A; Aff. of Mitchell Lipcon ¶ 8).

Interestingly, Lloyd's presently operates as if it is subject to United States securities laws. (R5-121)(e.g., "[t]hose promoting schemes must provide . . . a legal opinion covering compliance with relevant federal and state securities laws").

E. The spouses. Charles Lipcon, Name Irmgard's husband, and Barbara Lipcon, Name Mitchell's wife, signed several documents including notes and mortgages on their homes to secure letters of credit in favor of Lloyd's that were necessary for their respective spouses to join in 1983. (R5-108-7 ¶ 5). The Names' spouses did so because Lloyd's provided them with the same false and misleading information it provided to the Names. Lloyd's included all spouses in all informational conferences and discussions of the investment program to promote the spouses' financial support.

The spouses did not sign the original General Under-

2/ This injunction was based on findings that Lloyd's violated Colorado's securities acts, patterned after the federal acts, both by selling unregistered securities and by fraud and misrepresentation in the sale of securities. (R1-1 Ex. B Ex. 5 at 12-13, 14-15). The Colorado court's fraud findings mirror the fraud allegations of the complaint in this case.

taking. More importantly, they did not sign the subsequent revised General Undertaking, or any other document, that required them to litigate in England or under English law. (R5-108-8 ¶ 7).

F. Relief sought. The Lipcons sued Lloyd's for claims under the Securities Act of 1933, §§ 5, 12(1) & 15, 15 U.S.C. §§ 77e, 77l & 77o, the Securities Exchange Act of 1934, § 10(b) & 20, 15 U.S.C. § 78j & 78t; 18 U.S.C. §§ 1961-1968 (the Racketeer Influenced and corrupt Organizations Act) and various provisions of Florida law.

Lloyd's moved to dismiss the second amended complaint on the ground that any claims had to be brought in English courts under English law. (R5-117). The district court dismissed the action. The Eleventh Circuit found the issue raised to be an "important question" and "a close question." It closely examined the arguments presented in the SEC's amicus brief. But the Eleventh Circuit affirmed. 148 F.3d at 1287. The Lipcons timely filed this proceeding.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD TAKE JURISDICTION AND DETERMINE THAT THE ANTI-WAIVER PROVISIONS OF THE UNITED STATES SECURITIES LAWS PRECLUDE ENFORCEMENT OF CERTAIN CHOICE-OF-LAW CLAUSES IN INTERNATIONAL AGREEMENTS.

Investors can agree to have their disputes arbitrated. They can agree to do so in foreign countries. And investors can agree to have their disputes decided in foreign courts. But this Court has never found it appropriate for parties to waive their substantive rights under the United States securities laws through a choice of foreign law, as opposed to just a choice of forum. This is not simply a question of judicial determination of public policy. Nor is it a question of balancing the scope of the remedy in England against the scope of the remedy in the United States. Congress has made the choice; the plain language of the anti-waiver provisions prohibits such a result. The Securities and Exchange Commission has filed amici curiae briefs in the last three cases which challenged the Lloyd's choice clauses. See A-46. In each case, the SEC agreed the antiwaiver provisions void these clauses. This Court should affirm the SEC's interpretation.

A. This Court has left this issue open on several previous occasions, but has repeatedly indicated that it would invalidate a choice of foreign law in lieu of United States securities laws.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), this Court ruled on the validity of choice of forum clauses that selected arbitration in foreign countries. In each case, this Court noted that it was not deciding the validity of a choice of law clause. It indicated that the validity of a choice of law clause would be subject to a substantially different analysis; an agreement to arbitrate would not waive substantive rights. 473 U.S. at 627. *See also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989); *Shearson/American*

Express Inc. v. McMahon, 482 U.S. 220 (1987). The *Mitsubishi Motors* Court found that courts may not compel arbitration if the plaintiff could not "effectively vindicate its statutory cause of action in the [foreign] arbitral forum." 473 U.S. at 637. The Court stressed the fact that the arbitrators *would* consider the plaintiff's United States antitrust claims. *Id.* at 637 n.19.

This case presents the question this Court did not explicitly decide in *Mitsubishi* or *Scherk*: Does a clause which selects the law of another country to govern an agreement violate the anti-waiver provisions of the Securities and Exchange Acts? This Court should take jurisdiction here to resolve this open question.

Scherk ruled only on the issue of whether an arbitration clause violated the anti-waiver provisions of the Securities Exchange Act of 1934. It held that the Arbitration Act overrode any contrary provision of the earlier Securities Exchange Act. It enforced the arbitration clause because that choice was appropriate in the international transaction at issue; that choice was did *not* a choice of law. The Court noted several times that choice of law was not an issue.

> The dissenting opinion raises the specter that our holding today will leave American investors at the mercy of multinational corporations with "vast operations around the world . . . ." Our decision, of course, has no bearing on the scope of the substantive provisions of the federal securities laws for the simple reason that the question is not presented in this case.

417 U.S. at 518, n.12. *See also id.* at 519, n.13.

This Court continued its move in favor of arbitration in *Mitsubishi Motors*. But it noted:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.

473 U.S. at 627. It held that a United States court may not compel arbitration if the plaintiff could not "effectively vindicate its statutory cause of action in the [foreign] arbitral forum." *Id.* at 637. The Court stressed the fact that the arbitrators *would* consider the plaintiff's United States antitrust claims. *Id.* n.19.

Two more decisions followed which also emphasized this distinction between the choice of forum and the substantive law and emphasized the preeminence of the Arbitration Act. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *McMahon*, 482 U.S. 220. There is no doubt from the language of these decisions that the Court based its conclusion on "[t]he shift in the Court's views on *arbitration*. . . ." *Rodriguez de Quijas*, 490 U.S. at 481. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute. . . ." *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 628).

> Our conclusion is reinforced by our assessment that resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act.

Rodriguez de Quijas, 490 U.S. at 485-86. *See also McMahon*, 482 U.S. at 226, 229-30 ("The Arbitration Act thus establishes a "federal policy favoring arbitration," requiring that "we rigorously enforce agreements to arbitrate"; the choice clause does not "weaken [the] ability [of investors] to recover under the [securities laws]" nor deprive investors of an "adequate means of enforcing [those] provisions")(citations omitted).[3/]

In short, this Court on several occasions has noted the question raised in this case and has indicated that an agreement to apply foreign law in a foreign forum will not be given effect if it eliminates plaintiffs' rights under United States law. This is particularly true where Congress has expressly forbidden the waiver of rights under a particular United States law, as in this case.

B. The circuit court decisions on the meaning of the anti-waiver provision in the context of the Lloyd's litigation are contrary to decisions of other

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[3/] It is interesting to note, as did the *McMahon* Court, that

> [W]here, as in this case, the prescribed procedures are subject to the [SEC]'s § 19 authority, an arbitration agreement does not effect a waiver of the protections of the Act.

482 U.S. at 234. *See also id.* at 238 ("In this case, where the SEC has sufficient statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights, enforcement does not effect a waiver of 'compliance with any provision' of the Exchange Act under § 29(a)"). The SEC took a far different position as to Lloyd's conduct here.

courts on the same question in other contexts and contrary to this Court's opinions on the validity of choice of law clauses under such circumstances.

A choice of law clause is presumptively valid unless the clause is unreasonable under the circumstances. Such a clause may be unreasonable where (1) the clause was incorporated in the agreement through fraud or overreaching; (2) "trial in the contractual forum will be so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court;" (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement would contravene a strong public policy of the forum in which suit is brought, "whether declared by statute or by judicial decision." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 16-17 (1972).

The fourth ground for unreasonableness is at issue here. Eight circuits have ruled on the enforceability of the specific clauses at issue here. A panel of the Ninth Circuit found the clauses violated the anti-waiver provisions of the Acts. *Richards v. Lloyd's of London*, 107 F.3d 1422 (9th Cir. 1997). However, the en banc court reversed that panel. *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998)(en banc). It followed the Second, Fourth, Fifth, Sixth, Seventh and Tenth Circuits and enforced the clauses. *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Haynesworth v. The Corporation*, 121 F.3d 956 (5th Cir. 1997); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969

F.2d 953, 958 (10th Cir. 1992). The Eleventh Circuit then reached the same result here. *Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285.

However, the numbers do not give a total picture. As the Eleventh Circuit noted in this case, "the reasoning of those courts has not been uniform." 148 F.3d at 1290. In fact, only four circuits specifically analyzed the issue of whether the anti-waiver provisions preclude enforcement of the choice clauses.[4/] Of those circuits to address the issue, three expressed serious concerns about violations of United States public policy. The Eleventh Circuit is the latest of those courts. The Eleventh Circuit commenced its analysis by agreeing with the Lipcons' position.

> [A]ppellants' argument finds strong support in the plain language of the anti-waiver provisions, which facially admit of no exceptions, . . .

148 F.3d at 1292. But the court concluded that precedent and policy considerations in the international arena overrode the plain language of the statute. *Id.*

[4/] The Tenth Circuit in *Riley* was the first circuit to address a challenge to the clauses. But it addressed a different legal issue; the Name there conceded that "the enforcement of choice of forum and choice of law clauses is consistent with recent U.S. Supreme Court decisions." 969 F.2d at 956-57. *Allen* is also of little assistance since it was a suit brought by Names who claimed Lloyd's failed to disclose financial information in connection with a 1995 settlement offer. The court did not rule on the effect of the anti-waiver statutes. 94 F.3d at 930. *Shell* likewise is irrelevant because suit was brought only under Ohio law which has no anti-waiver provision.

The Second Circuit, the first circuit to actually analyze the question, began its decision with a similar view: "We believe that there is a serious question whether United States public policy has been subverted by the Lloyd's clauses." *Roby*, 996 F.2d at 1363. It then stated:

> We are concerned in the present case that the Roby Names' contract clauses may operate "in tandem" as a prospective waiver of the statutory remedies for securities violations, thereby circumventing the strong and expansive public policy in deterring such violations. . . . *[W]e do not believe that a United States court can in good conscience enforce clauses that subvert a strong national policy, particularly one that for over fifty years has served as the foundation for the United States financial markets and business community*. . . . We believe that if the Roby Names were able to show that available remedies in England are insufficient to deter British issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure, *we would not hesitate to condemn the choice of law, forum selection and arbitration clauses as against public policy*.

Roby, 996 F.2d at 1364-65 (citing *Mitsubishi*, 473 U.S. at 636 n.19).[5/] *See also id.* at 1364 n.3 (noting *Scherk*, 417

5/ *Roby* upheld the clauses in part because the SEC had never challenged Lloyd's practices and had not claimed Lloyd's was subject to its jurisdiction. Subsequently, the SEC took the position that the clauses (continued...)

U.S. 506 not contrary because "[n]owhere in the opinion is it suggested that a choice of law clause invariably trumps the public policies underlying the securities laws").

The Seventh Circuit expressed the same concerns:

> [W]e have serious concerns that Lloyd's clauses operate as a prospective waiver of statutory remedies for securities violations. *By including the anti-waiver provisions in the securities laws, Congress made clear that the public policy of these laws should not be thwarted. . . .*

Bonny, 3 F.3d at 160-61.

Here, there is a statute which states in plain, straightforward language that *any* document which waives compliance with the United States securities laws is void. That language provides a clear statement of Congressional policy that must be enforced as written. *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 27, 28 (1988)(public policy analysis not controlling when Congress expressed its will in a statute that addresses the issue before the Court; once Congress has spoken, "that is the end of the matter"). *See also* Note, *No Way Out: An Argument Against Permitting Parties to Opt Out of U.S. Securities Law In International Transactions*, 97 Colum.L.Rev. 57, 74-78 (1997).

Despite the admittedly plain language of the anti-waiver provisions, the Eleventh Circuit and the circuits that

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5/ (...continued)
violate the anti-waiver provisions.

ruled before it all concluded that other policy considerations in the international context outweighed the anti-waiver provisions. *See Lipcon*, 148 F.3d at 1293 (finding this Court has treated domestic and international transactions differently). This conclusion is simply contrary to those decisions that interpret the anti-waiver provisions in a domestic context. But there is no basis for distinguishing between domestic and international transactions.

United States courts have consistently refused to enforce any kind of domestic agreement that waives unripened securities claims. *E.g.*, *Kusner v. First Pennsylvania Corp.*, 531 F.2d 1234, 1239 (3d Cir. 1976)(indenture provision that barred certain suits could not bar action under § 10(b)); *Rogen v. Illikon Corp.*, 361 F.2d 260 (1st Cir. 1966); *McMahan & Co. v. Wherehouse Entertainment, Inc.*, 859 F.Supp. 743 (S.D.N.Y. 1994)("no action" clause in securities is no defense to federal securities claims), *aff'd in part, rev'd in part on other grounds*, 65 F.3d 1044 (2d Cir. 1995); *Synalloy Corp. v. Gray*, 816 F.Supp. 963 (D.Del. 1993)(corporation could not waive right to recover under § 16(b), even if it benefitted from illegal conduct); *Special Transportation Serv., Inc. v. Balto*, 325 F.Supp. 1185 (D. Minn. 1971)(contractual provision limiting buyer's remedies for misstatements by seller of securities unenforceable); *Jadoff v. Gleason*, 140 F.R.D. 330, 333-34 (M.D.N.C. 1991); *Special Transp. Serv., Inc. v. Balto*, 325 F.Supp. 1185, 1186 (D.Minn. 1971)(all invalidating non-reliance and integration clauses which would preclude relief based on oral misrepresentations). *See also Hayden v. McDonald*, 742 F.2d 423, 430 (8th Cir. 1984)(no waiver under Minnesota statute identical to federal anti-waiver statutes, though some plaintiffs were attorneys familiar with securities laws and others were represented by attorneys who specialized in se-

curities). The reasoning is simple: if the clause waives the claim, it is invalid.

The anti-waiver provisions occupy a special position; Congress has attached more importance to waiver of the Securities Acts than to some constitutionally guaranteed rights.

> We recognize, of course, that ordinarily one may waive constitutionally guaranteed rights if it is intentionally and voluntarily done.
>
> As to the sale of unregistered securities, however, Congress has specifically placed waivers in a different context.

Meyers v. C & M Petroleum Producers, Inc., 476 F.2d 427, 429 (5th Cir. 1973)(citations omitted). *See also McMahon*, 482 U.S. at 230 ("[i]f a stipulation waives compliance with a statutory duty, it is void under [the anti-waiver provisions] whether voluntary or not").

This straightforward analysis of the anti-waiver provisions to render a particular clause unenforceable should apply to the enforceability of the choice of law clause in this case. This analysis is not novel. This Court has applied the same kind of analysis each time a party has challenged a forum selection clause as violative of a United States statute. In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), the plaintiffs challenged a forum selection clause contained in a cruise ship ticket. They claimed the clause violated 46 U.S.C. § 183c which prohibits clauses that limit liability or "lessen, weaken, or avoid" a claimant's right to trial by a court of competent jurisdiction. The plaintiffs argued that the selection of Florida as the forum for a suit by

Washington State residents "lessen[ed], weaken[ed], or avoid[ed]" their right to trial. In addressing the issue, this Court looked at the plain language of the statute and determined that the clause simply required an action to be brought in Florida, which is plainly a court of competent jurisdiction. 499 U.S. at 596. The Court also reviewed the statute's legislative history and determined that it was intended to preclude passenger ticket conditions that tried to limited liability for negligence, or remove cases to arbitration instead of courts. The Court held that the forum selection clause did not violate the plain language of the statute.

In *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), the Court ruled that a foreign arbitration clause in a bill of lading was valid under the Carriage of Goods by Sea Act (COGSA). COGSA contains a provision similar to the anti-waiver provisions at issue here. 46 U.S.C. § 1303(8). The plaintiffs argued that enforcement of a foreign arbitration clause lessened COGSA liability because it increased the transaction costs of obtaining relief. This Court rejected that argument. It distinguished between "explicit statutory guarantees and the procedure for enforcing them, between applicable liability principles and the forum in which they are to be vindicated." 515 U.S. at 533. It concluded that there was no problem in allowing foreign arbitrators to decide the case *because that choice was simply one of forum, not substance.*

Vimar Seguros also noted the issue of whether the application of law other than COGSA would reduce liability below that guaranteed by COGSA. 515 U.S. at 540. "Whatever the merits of petitioner's comparative reading of COGSA and its Japanese counterpart, its claim is premature" because the arbitrators had not yet decided which law they

would apply. The district court had retained jurisdiction over the case and could rule on such matters at the enforcement stage. *Id.* But this Court indicated the conclusion it would reach if the arbitrators applied Japanese law and that law in fact lessened the COGSA liability:

> Were there no subsequent opportunities for review and were we persuaded that "the choice-of-forum and choice-of-law clauses operated in tandem as a *prospective waiver of a party's right to pursue statutory remedies* . . . , we would have little hesitation in condemning the agreement as against public policy."

Id.(quoting *Mitsubishi Motors*, 473 U.S. at 637, n.19 and citing *Knott v. Botany Mills*, 179 U.S. 69 (1900)(nullifying choice-of-law clause under Harter Act, statutory precursor to COGSA, where British law would enforce clause in bill of lading that exempted carrier from liability for damage to goods caused by its negligent loading and stowage).

Here, on the other hand, the choice-of-law clause plainly runs afoul of the anti-waiver provisions. The choice clause does not simply select a forum; it selects the law to be applied in that forum. The anti-waiver statutes allow for no exceptions. They prohibit waiver of "any provision *of this title or of the rules and regulations of the Commission.*" This does not mean waiver is acceptable if the defendant gives alternative remedies. It invalidates *any* waiver. The choice clauses select English law; they eliminate any claims under United States securities laws. Under the rationale of *Vimar Seguros*, *Mitsubishi* and *Shute*, the clauses are invalid.

The legislative history of the anti-waiver provisions

further supports this conclusion. As the panel in *Richards* noted:

> Congress was not ignorant of the potential international character of securities transactions. Congress specifically modified the 1933 Act to cover transactions in foreign commerce. S. Rep. No. 47, 73d Cong., 1st Sess. (1933) (accompanying S. 875). A court should not apply the reasonableness test or say whether the clauses offended any policy of the United States when Congress has expressly made that determination.

107 F.3d at 1429.

In sum, this Court should grant this petition to answer the question it has repeatedly left open. This Court should determine that the plain language of the anti-waiver provisions of the United States securities laws means what it says and prohibits waiver of our laws in both domestic and international transactions.

II. THE ELEVENTH CIRCUIT MISCONSTRUED *FIRST OPTIONS OF CHICAGO, INC. V. KAPLAN*, 514 U.S. 938 (1995) WHEN IT HELD THAT NON-SIGNATORIES TO THE AGREEMENT WERE BOUND.

The Eleventh Circuit held that the Names' spouses are bound by the choice-of-law clause, even though many spouses, including the Lipcons, co-signed letters of credit

and notes years *before* Lloyd's prevailed on the Names to sign the choice clause. A party is only bound by the contract clauses he or she signs, directly or through an agent. The spouses did not sign any such clauses. They are entitled to litigate in United States courts under United States law.

This Court recently held that parties are bound only by contract clauses to which they agree, in documents they sign. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995)(aff'g 19 F.3d 1503 (3d Cir. 1994)). *See also Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1294 (3d Cir. 1996)("The Kaplans were not obligated to arbitrate because they had not agreed to do so").

In *Kaplan*, one of the individual defendants was the president, director and sole shareholder of the defendant corporation. He had signed a contract with an arbitration clause, solely on behalf of the corporation. The court did not require the individual to arbitrate the claims against him because he had not signed the agreement individually, even though he had individually signed related agreements. The Third Circuit based this conclusion on a simple contract principle, which this Court later approved:

> Arbitration is fundamentally a creature of contract . . . 'arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.'

Kaplan, 19 F.3d at 1512, *approved* 514 U.S. 938.

The Third Circuit reached the same conclusion in *Dayhoff* as to both an arbitration clause and a forum selection

clause: the clauses "can be enforced only by the signatories to those agreements." 86 F.3d at 1296.

Other courts have applied the same principles and concluded that non-signatories to contracts are not bound by arbitration clauses in the contracts. *Morewitz v. The West of England Ship Owners Mutual Protection and Indemnity Ass'n*, 62 F.3d 1356, 1365 (11th Cir. 1995)(arbitration not required unless parties actually agreed to it; arbitration clause could not affect third party beneficiaries who claimed under insurance policy where they did not sign insuring agreement which was only between vessel and insurer); *Packer v. TDI Sys., Inc.*, 959 F.Supp. 192, 198 (S.D.N.Y. 1997)(where letter agreement did not state that terms of note were incorporated by reference, forum selection clause in note was not incorporated in letter agreement and party to note who was not party to letter agreement was not bound by clause); *In re Interactive Video Resources, Inc.*, 170 B.R. 716 (S.D.Fla. 1994)(surety not signatory to underlying agreement not bound by arbitration clause in that agreement).

Other courts have reached similar results in determining whether spouses can be required to arbitrate pursuant to clauses in contracts the spouses did not sign. *E.g.*, *Swensens' Ice Cream Co. v. Corsair Corp.*, 942 F.2d 1307, 1310 (8th Cir. 1991)(wife not compelled to arbitrate any dispute that arose out of franchise agreements she did not sign; her execution of guarantee for third franchise location did not bind her to earlier agreements).

Here, the spouses did not sign either the original General Undertaking or the revised General Undertaking. *They did not sign anything at all, much less anything that contained a choice clause*. The spouses should not be bound

by the choice-of-law clause in the revised General Undertaking.

Despite this Court's plain holding in *First Options*, the Eleventh Circuit applied a broader view. It held:

> "In order to bind a non-party to a forum selection clause, the party must be 'closely related' to the dispute such that it becomes 'foreseeable' that it will be bound."

148 F.3d at 1299 (quoting *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993)(quoting *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 n.5 (9th Cir. 1988)). *Hugel* and *Manetti-Farrow* predate *First Options*. The holding quoted above could not survive this Court's holding in *First Options* that the president, director and sole shareholder of the corporation was not bound individually by an agreement he signed only in his corporate capacity.

As can be seen from the cited cases, there are decisions which enforce arbitration clauses and the like against non-signatories because they are "closely related" to the dispute. And there are decisions which apply a literal view and enforce such clauses only against the person or entity who actually signed the contract that contained the clause. This Court apparently resolved the issue in *First Options*. But the Eleventh Circuit ignored this Court's decision. This Court should take jurisdiction and resolve this conflict.

CONCLUSION

For the foregoing reasons, Petitioners Irmgard Lipcon, Charles R. Lipcon, Mitchell Lipcon and Barbara

Lipcon respectfully request this Court to grant a Writ of Certiorari to review the judgment of the Eleventh Circuit.

Respectfully submitted,

SHARON L. WOLFE
Counsel of Record
COOPER & WOLFE, P.A.
200 S. Biscayne Blvd., #3580
Miami, Florida 33131-2316
Telephone: (305) 371-1597

CHARLES R. LIPCON
2480 One Biscayne Tower
Two S. Biscayne Blvd.
Miami, Florida 33131
Telephone: (305) 373-3016

Counsel for Respondent

APPENDIX

Irmgard LIPCON; Mitchell Lipcon; Charles R. Lipcon; Barbara Lipcon, Plaintiffs-Appellants,

v.

UNDERWRITERS AT LLOYD'S, LONDON, a.k.a. Corporation of Lloyd's, a.k.a. Society of Lloyd's, a.k.a. Lloyd's of London, Defendants-Appellees.

No. 97-5144.

United States Court of Appeals,
Eleventh Circuit.

Aug. 5, 1998.

Before HATCHETT, Chief Judge, BLACK, Circuit Judge, and KRAVITCH, Senior Circuit Judge.

KRAVITCH, Senior Circuit Judge:

In this appeal, we are confronted with the important question of whether the anti-waiver provisions of the United States securities laws preclude enforcement of certain choice-of-law and forum-selection clauses ("choice clauses") in international agreements. Although we recognize that it is a close question, we follow the weight of circuit authority and conclude that the choice clauses are enforceable despite the anti-waiver provisions. In addition, we conclude that the agreements in this case satisfy scrutiny for fundamental fairness and do not contravene public policy. Finally, we conclude that Irmgard, Mitchell, Charles, and Barbara Lipcon (collectively, "appellants" or "the Lipcons") all are bound by their agreement with Underwriters at Lloyd's

London ("Lloyd's"). Accordingly, we affirm the district court's decision to dismiss the Lipcons' complaint against Lloyd's.

I.

Lloyd's is a large insurance market in which more than three hundred Underwriting Agencies compete for underwriting business. Pursuant to the British Lloyd's Acts of 1871 and 1982, Lloyd's oversees and regulates the competition for underwriting business in the insurance market; according to the amicus curiae brief of the British Government, Lloyd's "has statutory powers granted by Parliament to regulate the affairs of the international insurance market in London...." [1] Lloyd's itself, however, does not accept premiums or insure risks. Instead, Underwriting Agencies, which act as syndicates, compete for the insurance business. Each Underwriting Agency is controlled by a Managing Agent, who is responsible for the financial status of its agency. The Managing Agent must attract not only underwriting business from brokers but also the capital with which to insure the risks that are underwritten.

Managing Agents recruit "Names" to provide the underwriting capital. A Name becomes a Member of the Society of Lloyd's through a series of agreements, proof of financial means, and the deposit of an irrevocable letter of credit in favor of Lloyd's. By becoming a Member, a Name obtains the right to participate in the Lloyd's Underwriting Agencies. The Names, however, do not deal directly with Lloyd's or with the Managing Agents. Instead, the Names

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[1] British Government Br. Amicus Curiae at 3.

are represented by Members' Agents, who, pursuant to agreement, act as fiduciaries for the Names. Upon becoming a Name, an individual selects the underwriting agencies in which he wishes to participate. The Names generally join more than one underwriting agency in order to spread their risks across different types of insurance. In large part because of the experience of the Members' Agents, Names generally rely on the advice of their Members' Agents in deciding in which syndicates to invest. Selecting well is of the utmost financial importance because a Name is responsible for his share of an agency's losses.

In addition to providing the indicia of financial security mentioned above, to become a Name one must travel to England to acknowledge the attendant risks of participating in a syndicate by signing a standard-form "General Undertaking." The General Undertaking is a two-page document containing the choice-of-forum and choice-of-law clauses (collectively the "choice clauses"), which form the basis for this dispute. The choice clauses provide:

> The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.
>
> Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership

> of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding ... arising out of or relating to such matters shall be brought in such courts.... [2]

Irmgard and Mitchell Lipcon are Names who entered into underwriting agreements, and Charles and Barbara Lipcon, who signed letters of credit to provide collateral for the Names, are their spouses. Irmgard and Mitchell first became Names in 1983 and 1984, respectively, and in 1986 signed a revised General Undertaking that contains the choice clauses set out above.

After it became clear that the Names would be responsible for massive losses for asbestos and pollution claims, appellants brought suit in United States District Court for the Southern District of Florida alleging that: (1) Lloyd's actively sought investors from the United States to fill an urgent need to build up capital; (2) concealed information regarding the possible consequences of the risks undertaken; and (3) deliberately and disproportionately exposed the Names to massive liabilities for which sufficient underwriting capital or reinsurance was not available. The Lipcons stated claims under the Securities Act of 1933, §§ 5, 12(1), & 15, 15 U.S.C. §§ 77e, 77l, & 77o; the Securities Exchange Act of 1934, §§ 10(b) & 20, 15 U.S.C. §§ 78j & 78t; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968; and various provisions of Florida law. The district court granted the motion to dismiss brought by Lloyd's, finding that the choice clauses are enforceable and preclude litigation arising out of the

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[2] R:1-8, Ex. B.

Lipcons' agreement with Lloyd's in United States courts. In addition, the district court concluded that Charles and Barbara Lipcon, who signed letters of credit in favor of Lloyd's but never entered into any agreement with Lloyd's, are bound by the choice clauses.

As in numerous similar cases in the courts of appeals involving these choice clauses, "[t]his appeal does not address the merits of the underlying claims. It addresses only the Names' contention that their disputes with Lloyd's should be litigated in the United States despite contract clauses binding the parties to proceed in England under English law." Richards v. Lloyd's of London, 135 F.3d 1289, 1292 (9th Cir.1998).

II.

As a preliminary matter, we note that some uncertainty exists as to both the appropriate vehicle for motions to dismiss on the basis of forum-selection clauses and the proper standard of review for district court decisions granting such motions to dismiss. See Haynsworth v. Lloyd's of London, 121 F.3d 956, 961 & n.8 (5th Cir.1997) (citing cases); 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1352 (2d ed. Supp. 1998). In the case before us, Lloyd's styled its motion as a Rule 12(b)(3) motion to dismiss for improper venue. Fed.R.Civ.P. 12(b)(3).

The Ninth Circuit has treated such motions as motions brought pursuant to Fed.R.Civ.P. 12(b)(3) to dismiss for lack of venue, see Richards v. Lloyd's of London, 135 F.3d 1289, 1292 (9th Cir.1998); cf. Hugel v. Corporation of Lloyd's, 999 F.2d 206, 207 (7th Cir.1993)

(affirming district court's grant of defendant's Rule 12(b)(3) motion to dismiss for improper venue in case involving forum-selection clause); Commerce Consultants Int'l v. Vetrerie Riunite, 867 F.2d 697, 698 (D.C.Cir.1989) (same), and has reviewed district court decisions to enforce forum-selection and choice-of-law clauses for abuse of discretion, see id.; accord Sun World Lines, Ltd. v. March Shipping Corp., 801 F.2d 1066, 1068 & n.3 (8th Cir.1986). The Second Circuit, on the other hand, has treated such motions as motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). See AVC Nederland B.V. v. Atrium Inv. Partnership, 740 F.2d 148, 153 & n.8 (2d Cir.1984). Finally, several circuits have avoided resolving the issue of the appropriate form of pleading for a motion to dismiss based upon choice clauses and instead have held simply that "the enforceability of a forum selection clause is a question of law reviewable de novo." Haynsworth, 121 F.3d at 961; see id. (electing not to reach "the considerably more enigmatic question of whether motions to dismiss on the basis of forum selection clauses are properly brought as motions under Fed.R.Civ.P. 12(b)(1), 12(b)(3), or 12(b)(6), or 28 U.S.C. § 1406(a)"); Shell v. R.W. Sturge, Ltd., 55 F.3d 1227, 1229 (6th Cir.1995); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 956 (10th Cir.1992) (noting that "[a] motion to dismiss based on a forum selection clause frequently is analyzed as a motion to dismiss for improper venue under Fed.R.Civ.P. 12(b)(3)," but failing to resolve issue).

In our view, motions to dismiss based upon forum-selection clauses ordinarily are not properly brought pursuant to Rule 12(b)(1), which permits motions to dismiss for lack of subject matter jurisdiction, because the basis upon which the defendants seek dismissal-namely, that the

agreement of the parties prohibits the plaintiff from bringing suit in the particular forum--is unrelated to the actual basis of federal subject matter jurisdiction--namely, federal question jurisdiction or diversity of citizenship, as the case may be. In the case before us, appellants stated claims under, inter alia, the federal securities laws, a sufficient basis for federal subject matter jurisdiction that is not affected by the parties' agreement to litigate elsewhere. See, e.g., Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946); Blue Cross & Blue Shield of Ala. v. Sanders, 138 F.3d 1347, 1352 (11th Cir.1998) (noting that under Bell, "a federal court may dismiss a federal question claim for lack of subject matter jurisdiction only if: (1) 'the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction'; or (2) 'such a claim is wholly insubstantial and frivolous' ") (quoting Bell, 327 U.S. at 682-83, 66 S.Ct. at 776) (emphasis omitted); Central Contracting Co. v. Maryland Cas. Co., 367 F.2d 341, 345 (3d Cir.1966) (stating that a forum-selection clause "does not oust the jurisdiction of the courts; in effect it merely constitutes a stipulation in which the parties join in asking the court to give effect to their agreement by declining to exercise its jurisdiction"). Instead, we hold that motions to dismiss upon the basis of choice-of-forum and choice-of-law clauses are properly brought pursuant to Federal Rule of Civil Procedure 12(b)(3) as motions to dismiss for improper venue.

We are aware that the First Circuit has treated motions to dismiss upon the basis of forum selection clauses as Rule 12(b)(6) motions urging dismissal for failure to state a claim upon which relief can be granted. See Lambert v. Kysar, 983 F.2d 1110, 1112 n.1 (1st Cir.1993); LFC

Lessors, Inc. v. Pacific Sewer Maintenance, 739 F.2d 4, 6-7 (1st Cir. 1984). Although we perceive no significant doctrinal error in that approach, we consider Rule 12(b)(3) a more appropriate vehicle through which to assert the motion to dismiss. We find support for this conclusion in the Supreme Court's decision in Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 32, 108 S.Ct. 2239, 2245 (1988), in which the Court held that 28 U.S.C. § 1404(a), which vests in the district court discretion to transfer a civil action to "any other district or division where it might have been brought," controls the request of a party in a diversity suit to give effect to a contractual forum- selection clause by transferring the action. Although the Supreme Court did not decide the precise question presented in the case before us, the Court's conclusion that the federal transfer-of-venue statute governs district court decisions in enforcing forum-selection clauses provides support for our view that motions to dismiss based upon forum-selection clauses are cognizable as motions to dismiss for improper venue. See id. at 29-30, 108 S.Ct. at 2244 ("The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences.") (emphasis added); see also 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3803.1 (2d ed. 1986 & Supp. 1998) (discussing forum-selection clauses as "Contractual Modification" of venue).[3]

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[3] Unlike in Stewart, however, the federal statutory provisions governing transfer of venue from one United States District Court to another, see 28 U.S.C. § 1404(a) (providing that district court "may transfer any civil action to any other district or division where it might have been brought") (emphasis added); 28 U.S.C.

(continued...)

Although ordinarily we review "the dismissal of a lawsuit for improper venue under the standard of abuse of discretion," Home Ins. Co. v. Thomas Indus., Inc., 896 F.2d 1352, 1355 (11th Cir.1990), we conclude that there is good reason to treat district court decisions regarding the enforceability of forum-selection and choice-of-law provisions in international agreements as decisions of law reviewable de novo. Not only do such decisions at times require interpretation of the provisions of a contract--determinations that we review de novo, see, e.g., Zaklama v. Mt. Sinai Med. Center, 906 F.2d 650, 652 (11th Cir.1990)--but such decisions also, at least in the context of international agreements, require a complex analysis of fundamental fairness and public policy, see infra, section III--determinations that are quintessentially legal. We therefore hold that the enforceability of forum-selection and choice-of-law provisions in international agreements are questions of law that we review de novo.

A.

We note at the outset that although this circuit has not yet ruled on the validity of the Lloyd's choice clauses at issue in this case, we do not write on a clean slate. Thus far,

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[3] (...continued)
§ 1406(a) ("The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.") (emphasis added), do not apply in cases that involve a forum-selection clause that requires litigation in another country.

the Second[4], Fourth[5], Fifth[6], Sixth[7], Seventh[8], Ninth[9], and Tenth[10] Circuits have addressed the enforceability of the precise choice clauses that we confront today, and although the reasoning of those courts has not been uniform, all seven courts of appeals have concluded that the clauses are valid and enforceable. See generally D. Hall, Note, No Way Out: An Argument Against Permitting Parties to Opt Out of U.S. Securities Laws in International Transactions, 97 Colum. L.Rev. 57, 68 (1997).

B.

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[4] See Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d Cir.), cert. denied, 510 U.S. 945, 114 S.Ct. 385, 126 L.Ed.2d 333 (1993).

[5] See Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir.1996).

[6] See Haynsworth v. The Corporation, a/k/a Lloyd's of London, 121 F.3d 956 (5th Cir.1997).

[7] See Shell v. R.W. Sturge, Ltd., 55 F.3d 1227 (6th Cir.1995) (upholding choice clauses as basis for dismissing claims under Ohio securities laws).

[8] See Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir.1993), cert. denied, 510 U.S. 1113, 114 S.Ct. 1057, 127 L.Ed.2d 378 (1994).

[9] See Richards v. Lloyd's of London, 135 F.3d 1289, 1292 (9th Cir.1998).

[10] See Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir.), cert. denied, 506 U.S. 1021, 113 S.Ct. 658, 121 L.Ed.2d 584 (1992).

Appellants' first argument is that the choice clauses, which make United States law inapplicable to disputes arising between them and Lloyd's, are unenforceable under the anti-waiver provisions of the United States securities laws. The Securities Act of 1933 provides: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." 15 U.S.C. § 77n. The Securities Exchange Act of 1934 contains a similar provision. See 15 U.S.C. § 78cc(a) ("Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."). According to the Securities and Exchange Commission ("SEC"), which filed an amicus curiae brief, "These provisions are essential to the enforcement of the securities laws in that they prevent persons from avoiding their obligations under those laws through the simple expedient of requiring investors to waive their rights under those laws as a condition to engaging in securities transactions."[11]

The district court rejected appellants' and the SEC's argument that the anti- waiver provisions categorically render unenforceable the choice clauses in the Lipcons' contract. Instead, the district court reviewed the clauses under the framework for evaluating choice provisions in international agreements first announced in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907 (1972). In Bremen, an admiralty case that did not involve the securities laws, the Court enforced a choice-of-forum clause that required litigation in the courts of London. Because "[w]e

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[11] SEC Br. Amicus Curiae (hereinafter "SEC Br.") at 2.

cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts," id. at 9, 92 S.Ct. at 1913, the Court concluded that forum-selection clauses in international agreements "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances," id. at 10, 92 S.Ct. at 1913; see id. at 15, 92 S.Ct. at 1916 ("[I]n the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside."). Although the contract at issue in Bremen provided for a forum in which to litigate, as opposed to the substantive law that would apply to, any dispute, the Court noted that the choice-of-forum clause likely would have the effect of a choice-of-law clause:

> [I]t is the general rule in English courts that the parties are assumed, absent contrary indications, to have designated the forum with the view that it should apply its own law.... It is therefore reasonable to conclude that the forum choice clause was also an effort to obtain certainty as to the applicable substantive law.

Id. at 14 n.15, 92 S.Ct. at 1915 n.15.

In giving content to Bremen's "strong showing" standard for invalidating international choice-of-forum clauses, courts have announced that those provisions will be found "unreasonable under the circumstances," Bremen, 407 U.S. at 10, 92 S.Ct. at 1913 (internal quotations omitted), and thus unenforceable only when: (1) their formation was

induced by fraud or overreaching; (2) the plaintiff effectively would be deprived of its day in court because of the inconvenience or unfairness of the chosen forum; (3) the fundamental unfairness of the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of the provisions would contravene a strong public policy. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594-95, 111 S.Ct. 1522, 1528 (1991); Bremen, 407 U.S. at 15-18, 92 S.Ct. at 1916-17; Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1363 (2d Cir.), cert. denied, 510 U.S. 945 (1993). Applying this test (hereinafter "the Bremen test"), the district court concluded that the choice clauses in this case are enforceable.

Appellants and the SEC contend that the Bremen test is inapplicable when Congress has spoken directly as to whether it is permissible to waive United States statutory remedies. They argue that to apply the Bremen test--which requires courts to assess public policy, see Bremen, 407 U.S. at 15, 92 S.Ct. at 1916 ("A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision.")--is tantamount to treating "the anti-waiver provisions [of the securities laws] as merely reflecting a Congressional direction to the courts to decide whether 'the public policies incorporated into' the securities laws would be undermined."[12] This approach is incorrect, the SEC argues, because "[t]he anti-waiver provisions ... are not simply an expression of public policy that favors the United States securities laws unless other comparable laws are available. Rather, they are an express and unequivocal

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[12] SEC Br. at 14.

directive that the rights and obligations under the securities laws cannot be waived."[13] See also Richards v. Lloyd's of London, 135 F.3d 1289, 1297-98 (9th Cir.1998) (Thomas, J., dissenting).

Although appellants' argument finds strong support in the plain language of the anti-waiver provisions, which facially admit of no exceptions, precedent and policy considerations compel us to conclude that Bremen 's framework for evaluating choice clauses in international agreements governs this case. We turn first to an examination of Supreme Court precedent.

1.

In Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), "the Supreme Court explicitly relied on Bremen in a case involving a securities transaction." Richards v. Lloyd's of London, 135 F.3d 1289, 1293 (9th Cir.1998). Scherk involved an international transaction to sell a company, where that transaction was based upon a contract that included arbitration and choice-of-law clauses that provided for the application of Illinois law by an arbitrator in France. When the deal soured, one of the parties challenged the enforceability of the arbitration provision. In enforcing the provisions, the Court relied in large part upon the nature of international agreements:

> [I]n the absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes

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[13] SEC Br. at 14.

> arising out of the contract. Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

Scherk, 417 U.S. at 516, 94 S.Ct. at 2455; see id. at 516-17, 94 S.Ct. at 2456 ("A parochial refusal by the courts of one country to enforce an international arbitration agreement would ... invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.").

We recognize that Scherk differed from the case before us in that the choice clause before the Court in Scherk provided, by designating Illinois law as the governing law, for the application of United States securities law, see id. at 519 n.13, 94 S.Ct. at 2457 n.13 ("Under some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction. In this case, however, 'the laws of the State of Illinois' were explicitly made applicable to the arbitration agreement."), and thus that the Court in Scherk had no opportunity to decide if an international choice-of-law provision is enforceable if it conflicts with the anti-waiver provisions of the United States securities laws. Nevertheless, the Court's statement in Scherk that a choice-of-forum clause is "an almost indispensable precondition to achievement of the orderliness

and predictability essential to any international business transaction," 417 U.S. at 516, 94 S.Ct. at 2455, combined with the Court's observation that a forum-selection clause "might also be viewed as implicitly selecting the law of that place to apply to that transaction," id. at 519 n.13, 94 S.Ct. at 2457 n.13; see also Bremen, 407 U.S. at 13 n.15, 92 S.Ct. at 1915 n.15 (noting that in light of English law, it is "reasonable to conclude that the forum clause was also an effort to obtain certainty as to the applicable substantive law"), indicates that international agreements--even those that render United States securities law inapplicable--are sui generis.[14]

Appellants nevertheless point our attention to a line of Supreme Court cases that they contend indicate the Court's disapproval of choice provisions that waive the substantive protections of United States law. Supreme Court precedent, however, does not resolve the precise issue presented in this case: namely, whether an international agreement may, through the interaction of choice-of-forum and choice-of-law clauses, prospectively waive the protections of the United States securities laws.

Appellants claim that the Court in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 105 S.Ct.

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[14] We think it clear that the agreement in this case is "truly international," Scherk, 417 U.S. at 515, 94 S.Ct. at 2455, as that term was used in Scherk. In this case, the parties to the agreement are from different countries, the negotiations leading up to the agreement took place in the United States whereas the closing took place in England, and the subject matter of the transaction concerned investment in an international insurance market.

3346 (1985), indicated its unwillingness to permit choice provisions to eliminate United States statutory remedies. In Mitsubishi, the Court held that the Sherman Act did not render unenforceable a forum-selection provision in an international agreement, because "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Id. at 628, 105 S.Ct. at 3354 (emphasis added); see id. at 637, 105 S.Ct. at 3359 ("[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."). Appellants rely in particular on the Court's statement that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue the statutory remedy for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." Id. at 637 n.19, 105 S.Ct. at 3359 n.19. In Mitsubishi, however, the Court was not confronted with the scope of the anti-waiver provisions of the United States securities laws. See id. at 616, 105 S.Ct. at 3348 ("The principal question presented by these cases is the arbitrability, pursuant to the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of claims arising under the Sherman Act and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction.") (internal citations omitted). More important, the Court in Mitsubishi recognized and affirmed Scherk's policy of treating international commercial agreements as sui generis. See Mitsubishi, 473 U.S. at 629, 105 S.Ct. at 3355 ("As in Scherk..., we conclude that concerns of international comity, respect for the capacities of foreign and transnational

tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in the domestic context.").

Appellants rely as well upon Shearson/American Express, Inc., v. McMahon, 482 U.S. 220, 107 S.Ct. 2332 (1987), in which the Court held that the anti-waiver provision of the Securities Exchange Act of 1934 did not render an arbitration agreement unenforceable, because "[b]y its terms, [section 78cc(a)] only prohibits waiver of the substantive obligations imposed by the Exchange Act." Id. at 288, 107 S.Ct. at 2338 (emphasis added); see also Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485-86, 109 S.Ct. 1917, 1922 (1989) (holding that arbitration clause was not invalid under anti-waiver provisions of Securities Act; stating that "[o]ur conclusion is reinforced by our assessment that resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act")(emphasis added). McMahon, however, involved the enforceability of an arbitration clause in a domestic securities agreement. Although appellants contend that McMahon makes clear the Court's categorical unwillingness to permit waiver of the substantive remedies of the securities laws, we do not think that McMahon controls the case before us. As stated above, the Court consistently has treated "truly international agreements," Scherk, 417 U.S. at 515, 94 S.Ct. at 2455, differently than domestic transactions, which indisputably are subject to the anti-waiver provisions of the securities laws, see McMahon, 482 U.S. at 230, 107 S.Ct. at 2339.

Supreme Court precedent thus suggests that the enforceability of choice clauses in international agreements should be determined by a framework designed specifically for the international commercial context. Because the Supreme Court has not ruled on whether the anti-waiver provisions of the United States securities laws categorically render unenforceable choice-of-law clauses in international agreements, however, we turn to policy considerations.

2.

Underlying the Supreme Court's conclusions in Bremen and Scherk were two main concerns: (1) ensuring "the orderliness and predictability [that are] essential to any international business transaction," Scherk, 417 U.S. at 516, 94 S.Ct. at 2455; see Bremen, 407 U.S. at 15, 92 S.Ct. at 1916 (stating importance of "present-day commercial realities and expanding international trade"), and (2) furthering international comity, see Scherk, 417 U.S. at 516, 94 S.Ct. at 2456 (condemning "parochial refusal[s] by the courts of one country to enforce ... international agreement[s]"); Bremen, 407 U.S. at 9, 92 S.Ct. at 1913 ("We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."). See also Mitsubishi, 473 U.S. at 629, 105 S.Ct. at 3355 (relying on "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes....").

To conclude that the anti-waiver provisions of the United States securities laws categorically preclude sophisticated parties from entering into international

agreements--agreements that by definition involve parties and subject matter that would be subject to the laws of more than one nation if the parties did not contract ex ante for provisions governing choice of forum and choice of law--would undermine both policies upon which Bremen and Scherk were based. As the Ninth Circuit has observed, appellants' assertion that the statutory anti-waiver provisions categorically invalidate the choice clauses in the agreement with Lloyd's would, if correct, expand the reach of United States securities law to "any and all such transactions, no matter how remote from the United States." Richards v. Lloyd's of London, 135 F.3d 1289, 1293 (9th Cir.1998); see also Allen v. Lloyd's of London, 94 F.3d 923, 929 (4th Cir.1996) ("[W]e do not believe that Congress intended that the disclosure requirements of the United States securities law be exported and imposed as governing principles on markets conducted entirely in other countries simply because membership in such markets is solicited in the United States.").

We also find in the content of the Bremen test itself support for our conclusion that the anti-waiver provisions of the United States securities laws do not preclude application of the Bremen test to determine the validity of the choice clauses. A court will invalidate a choice clause in an international agreement when "enforcement would contravene a strong public policy of the forum in which the suit is brought...." Bremen, 407 U.S. at 15, 92 S.Ct. at 1916; see infra section III.C; Richards, 135 F.3d at 1293; Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1363 (2d Cir.1993). Thus, "[i]n Bremen itself, the Supreme Court contemplated that a forum selection clause may conflict with relevant statutes." Richards, 135 F.3d at 1293.

Although we do not deny that there is some force to appellants' argument that the anti-waiver provisions preclude application of the Bremen test, we believe that to invalidate the choice provisions for that reason in effect would be to conclude that "the reach of the United States securities laws [is] unbounded," Richards, 135 F.3d at 1293, and to ignore the Supreme Court's caveat that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts," Bremen, 407 U.S. at 9, 92 S.Ct. at 1913. Because we are unwilling so to conclude, we hold that the anti-waiver provisions of the United States securities laws do not categorically render unenforceable the Lloyd's choice clauses, and we join the seven other courts of appeals that have addressed the issue in holding that the Bremen test controls our resolution of the enforceability of the Lloyd's choice clauses. See Richards, 135 F.3d at 1292-94; Haynsworth v. The Corporation, a/k/a Lloyd's of London, 121 F.3d 956, 962 (5th Cir.1997); Allen v. Lloyd's of London, 94 F.3d 923, 928 (4th Cir.1996); Shell v. R.W. Sturge, Ltd., 55 F.3d 1227, 1229-30 (6th Cir.1995); Bonny v. Society of Lloyd's, 3 F.3d 156, 159 (7th Cir.1993), cert. denied, 510 U.S. 1113 (1994); Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1362-63 (2d Cir.), cert. denied, 510 U.S. 945 (1993); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 957 (10th Cir.), cert. denied, 506 U.S. 1021 (1992).

III.

Appellants contend on appeal that even if the anti-waiver provisions of the United States securities laws do not per se invalidate the choice clauses, the district court erred in concluding that the Bremen test was satisfied and that the

choice clauses in this case are enforceable. We disagree and conclude that the district court correctly applied the Bremen test.

As noted supra, section II.B, forum-selection and choice-of-law clauses "are presumptively valid where the underlying transaction is fundamentally international in character." Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1362 (2d Cir.) (citing Bremen, 407 U.S. at 15, 92 S. Ct. at 1916), cert. denied, 510 U.S. 945 (1993). "This presumption of validity may be overcome, however, by a clear showing that the clauses are 'unreasonable under the circumstances.'" Roby, 996 F.2d at 1363 (quoting Bremen, 407 U.S. at 10, 92 S.Ct. at 1913 (internal quotation omitted)). Choice clauses will be found "unreasonable under the circumstances," Bremen, 407 U.S. at 10, 92 S.Ct. at 1913 (internal quotations omitted), and thus unenforceable only when: (1) their formation was induced by fraud or overreaching; (2) the plaintiff effectively would be deprived of its day in court because of the inconvenience or unfairness of the chosen forum; (3) the fundamental unfairness of the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of such provisions would contravene a strong public policy. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594-95, 111 S.Ct. 1522, 1528 (1991); Bremen, 407 U.S. at 15-18, 92 S.Ct. at 1916-17; Roby, 996 F.2d at 1363. Appellants contend that the choice clauses in this case are unreasonable under the first, third, and fourth Bremen factors.

A.

Appellants first contend that the choice clauses were the product of fraud and overreaching. The only specific

allegation in the complaint of fraud is that Lloyd's "tricked and fraudulently induced [the Lipcons] to sign on or about Nov. 5, 1986 a forum selection clause" by making "fraudulent statements" that included the following:

> The purpose, in both instances, is to bring the agreements into line with ... the new Lloyd's legislation.
>
> * * * * * *
>
> The new Premiums Trust Deed will incorporate some new provisions which are mainly of a technical nature, and will not affect you greatly on a day to day basis.[15]

Appellants contend that allegation of these statements is sufficient to invalidate the choice clauses.

In Scherk, the Court stated:

> In The Bremen we noted that forum-selection clauses "should be given full effect" when "a freely negotiated private international agreement [is] unaffected by fraud...." This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud, as in this case, the clause is unenforceable. Rather, it means that an arbitration or forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product

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[15] Second Am. Compl. at 3-4, ¶ 4.

of fraud or coercion.

417 U.S. at 519 n.14, 94 S.Ct. at 2457 n.14 (emphasis in original)(internal citations omitted). By requiring the plaintiff specifically to allege that the choice clause itself was included in the contract due to fraud in order to succeed in a claim that the choice clause is unenforceable, courts may ensure that more general claims of fraud will be litigated in the chosen forum, in accordance with the contractual expectations of the parties.

We conclude that the allegations in the Lipcons' complaint are insufficient to satisfy Scherk's rigorous standard for pleading fraud. The first alleged statement by Lloyd's (or, presumably, by an agent of Lloyd's)-- that "[t]he purpose, in both instances, is to bring the agreements into line with ... the new Lloyd's legislation"[16]--is in no way fraudulent or misleading. Indeed, the General Undertaking, which the Lipcons signed on the day that Lloyd's allegedly made this statement, specifically provides that "[t]hroughout the period of his membership of Lloyd's the Member shall comply with the provisions of Lloyd's acts 1871-1982 [and] any subordinate legislation made or to be made thereunder...."[17] An allegation that the defendant made a statement that accurately brings to the attention of the plaintiff the substantive provisions of the contract is insufficient to support a claim that the choice clauses were

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[16] It is not clear what the phrase "in both instances" refers to, but we assume arguendo that the phrase refers at least in part to the General Undertaking, as well as to the choice clauses specifically.

[17] R:1-8, Ex. B.

included in the contract as a result of fraud.

The second allegedly fraudulent statement--that "[t]he new Premiums Trust Deed will incorporate some new provisions which are mainly of a technical nature, and will not affect you greatly on a day to day basis"-- likewise fails to satisfy Scherk 's standard. Appellants contend that the insertion of the choice clauses in the General Undertaking was a change of more than simply "a technical nature" and that the statement thus was misleading and fraudulent. According to the original agreement, which was signed in October 1984 by Mitchell Lipcon and Lloyd's, the Premiums Trust Deed governs the disposition of "[a]ll premiums and other moneys collected on behalf of the Name" and provides that all such funds "shall be held upon the trusts declared in the Trust Deed."[18] An allegation that the Lipcons were induced--even fraudulently induced--to make changes in the Premiums Trust Deed is insufficient to support a claim that the choice clauses, which are contained in a separate agreement (the General Undertaking), were induced by fraud. As stated above, this court will invalidate a choice clause only if "the inclusion of that clause in the contract was the product of fraud or coercion." Scherk, 417 U.S. at 519 n.14, 94 S.Ct. at 2457 n.14 (emphasis in original). Appellants have not satisfied this standard.

B.

Appellants also contend that the remedies provided by English law are inadequate. They argue that no cause of action exists under the laws of England analogous to an action under Section 12(1) of the Securities Act of 1933 for

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[18] R:1-8, Ex. C.

securities registration violations. See Bonny v. Society of Lloyd's, 3 F.3d 156, 162 (7th Cir.1993), cert. denied, 510 U.S. 1113 (1994). Appellants also contend that their remedies under English law for misrepresentations made in connection with the sale of a security are inferior to those available under Section 12(2) of the Securities Act of 1933 because Section 14 of the Lloyd's Act of 1982 immunizes Lloyd's from any claims under the English Misrepresentations Act, absent a showing of bad faith. Finally, appellants assert that Lloyd's is immune from liability under England's Financial Services Act of 1986, which provides private remedies for fraud in connection with securities transactions, and that unlike United States securities law, see 15 U.S.C. § 77o, English law does not recognize controlling person liability.

We have little doubt that "the United States securities laws would provide [appellants] with a greater variety of defendants and a greater chance of success due to lighter scienter and causation requirements...." Roby, 996 F.2d at 1366. We will not invalidate choice clauses, however, simply because the remedies available in the contractually chosen forum are less favorable than those available in the courts of the United States. Instead, we will declare unenforceable choice clauses only when the remedies available in the chosen forum are so inadequate that enforcement would be fundamentally unfair. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595, 111 S.Ct. 1522, 1528 (1991); Roby, 996 F.2d at 1360-61 ("In the absence of other considerations, the agreement to submit to arbitration or the jurisdiction of the English courts must be enforced even if that agreement tacitly includes the forfeiture of some claims that could have been brought in a different forum."); Riley v. Kingsley Underwriting Agencies, Ltd.,

969 F.2d 953, 958 (10th Cir.), cert. denied, 506 U.S. 1021 (1992)("The fact that an international transaction may be subject to laws and remedies different and less favorable than those of the United States is not a valid basis to deny enforcement, provided that the law of the chosen forum is not inherently unfair.").

Like the seven other courts of appeals that have addressed this issue, we hold that English law provides remedies adequate to address the complaints of the aggrieved Names. Although Section 14 of the Lloyd's Act of 1982 exempts Lloyd's, its officers, and its employees from liability under the English Misrepresentations Act, no other entities within Lloyd's--such as the Members' Agents and Managing Agents, both of whom owe a fiduciary duty to the Names--are exempt. See Roby, 996 F.2d at 1365; Richards, 135 F.3d at 1296 ("The Names have recourse against both the Member and Managing Agents for fraud, breach of fiduciary duty, or negligent misrepresentation.") (citing Arubuthnott v. Fagan and Feltrim Underwriting Agencies, Ltd., 3 Re LR 145 (H.L.1994)); Shell v. R.W. Sturge, Ltd., 55 F.3d 1227 (6th Cir.1995) (noting that "England's highest appellate court recently upheld a lower court's ruling that Members' Agents can be contractually liable for negligent underwriting by the Managing Agents who run the insurance syndicates at Lloyd's") (citing Deeny v. Gooda Walker Ltd., slip op. (Q.B. Div'l Ct. Apr. 12, 1994), appeal dismissed, slip op. (H.L. July 25, 1994)). In addition, even Lloyd's itself is not immune from liability if appellants can make a credible showing of bad faith. We therefore conclude that the contractually chosen law is not fundamentally unfair and thus does not provide a basis upon which to deny enforcement of the choice clauses.

C.

Appellants argue that enforcement of the choice clauses would contravene a strong public policy, namely the policy expressed in the anti-waiver provisions of the United States securities laws that substantive remedies be available for securities violations. We already have rejected appellants' argument that the anti-waiver provisions categorically render invalid the choice clauses. See supra section II.B. We now must decide whether enforcement of the choice clauses, which would require appellants to litigate in England under English remedies, would undermine the public policies more generally expressed in the United States securities laws. In so doing, we are mindful that at least one commentator has criticized the decisions of some other courts of appeals on the ground that the public policy inquiry "necessitates an exploration of foreign legal regimes about which U.S. courts are likely to know little or nothing" and requires courts to "determine which of two incommensurables is greater." See D. Hall, Note, No Way Out: An Argument Against Permitting Parties to Opt Out of U.S. Securities Laws in International Transactions, 97 Colum. L.Rev. 57, 83 (1997). Nevertheless, we cannot avoid our duty to ensure, by determining whether enforcement of the choice clauses would contravene public policy, that enforcement of the choice clauses is not "unreasonable under the circumstances." Bremen, 407 U.S. at 10, 92 S.Ct. at 1913 (internal quotation omitted).

Although we share the concern of the Second and Seventh Circuits that "the contract clauses may operate 'in tandem' as a prospective waiver of the statutory remedies for securities violations," Roby, 996 F.2d at 1364 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473

U.S. 614, 637 n.19, 105 S.Ct. 3346, 3359 n.19 (1985)); accord Bonny, 3 F.3d at 160-61, we agree with those courts and the other five circuits that have addressed the issue that enforcement of the Lloyd's choice clauses does not contravene public policy. We reach this conclusion in part for the reasons stated by the other courts of appeals and in part for the reasons stated in section III.B--that English remedies are adequate to provide redress for the alleged actions that gave rise to appellants' United States securities claims.

In Roby and Bonny, the Second and Seventh Circuits, respectively, concluded that "[t]he framers of the securities laws were concerned principally with reversing the common law rule favoring 'caveat emptor,' " Roby, 996 F.2d at 1364 (citing SEC v. Arthur Young & Co., 584 F.2d 1018, 1025 n.51 (D.C.Cir.1978)), and accordingly that the United States securities laws embody the policies of "insuring full and fair disclosure by issuers and deterring the exploitation of United States investors," Bonny, 3 F.3d at 161. Appellants and the SEC do not disagree that the securities laws were intended to ensure disclosure and deter exploitation, but they argue that the Second and Seventh Circuits, as well as the district court in this case, ignored the compensatory function of private actions under the securities laws.

We agree with the SEC that private actions under the securities laws "serve as an important means of providing recompense to investors who have been harmed by wrongdoers."[19] We are more confident than the SEC, however, that the compensatory policy underlying United States securities law will be vindicated by litigation in

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[19] SEC Br. at 24.

English courts under English law; this is especially so given our conclusion that English law provides adequate remedies to appellants in this case. See supra, section III.B. Because we conclude that "the available remedies and potential damage recoveries suffice to deter deception of American investors[,] to induce the disclosure of material information to investors," Bonny, 3 F.3d at 162, and to provide redress to aggrieved Names, we hold that the choice clauses satisfy the public-policy prong of the Bremen test. We thus conclude that the district court did not err in finding that the choice clauses are enforceable.[20]

IV.

Finally, appellants argue that the district court erred in concluding that Charles and Barbara Lipcon, who signed letters of credit to provide collateral for their spouses but did not sign the General Undertaking, are so closely related to the dispute that they are bound by the choice clauses. We hold that the district court did not err and that the spouses must litigate their claims in English courts under English law, in accordance with the choice clauses.

"In order to bind a non-party to a forum selection clause, the party must be 'closely related' to the dispute such

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[20] Our conclusion is not affected by appellants' pleading of a cause of action under RICO. See Richards, 135 F.3d at 1296 ("The addition of RICO claims does not alter our conclusion."); Roby, 996 F.2d at 1366 ("Although the remedies [in England] and disincentives [to deter English issuers from exploiting American investors] might be magnified by application of RICO, we cannot say that application of English law would subvert the policies underlying that statute.").

that it becomes 'foreseeable' that it will be bound." Hugel v. Corporation of Lloyd's, 999 F.2d 206, 209 (7th Cir.1993) (quoting Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 514 n.5 (9th Cir.1988)); see also Manetti-Farrow, 858 F.2d at 514 n. 5 ("[A] range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses."). In Hugel, which involved a suit brought by a Name against Lloyd's, the Seventh Circuit affirmed the district court's finding that two non-signatory corporations were bound by the Name's assent to the Lloyd's choice clauses. See 999 F.2d at 209-10. The district court based its finding upon the fact that the Name owned 99% of one corporation, which owned 100% of the other. See id. The court of appeals noted that "[w]hile it may be true that third-party beneficiaries to a contract would, by definition, satisfy the 'closely related' and 'foreseeability' requirements, a third-party beneficiary status is not required." Id. at 209-10 n.7; cf. Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1297 (3d Cir.1996) (holding that a sister corporation that did not sign an arbitration agreement could not be bound by the agreement, but noting that if the "corporation's interests were directly related to, if not predicated upon, the [signatory's] conduct," the corporation would have been subject to agreement).

Because, as the district court found, the interests of the spouses in this dispute are completely derivative of those of the Name plaintiffs--and thus "directly related to, if not predicated upon" the interests of the Name plaintiffs, see Dayhoff, 86 F.3d at 1297--we affirm the district court's conclusion that the spouses are bound by the choice clauses.

V.

Our conclusion that the Lipcons are bound by the choice clauses does not in any way reflect our view of the merits of their substantive claims. We hold simply that the Lipcons must "honor [their] bargains," Mitsubishi, 473 U.S. at 640, 105 S.Ct. at 3361 (quoting Alberto-Culver Co. v. Scherk, 484 F.2d 611, 620 (7th Cir.1973) (Stevens, J., dissenting), rev'd, 417 U.S. 506, 94 S.Ct. 2449 (1974)), and attempt to vindicate their claims in the English courts under English law.

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 96-1137-CIV-MORENO

IRMGARD LIPCON; MITCHELL LIPCON; CHARLES R. LIPCON; and BARBARA LIPCON,

Plaintiffs,

vs.

UNDERWRITERS AT LLOYD'S LONDON a/k/a the CORPORATION OF LLOYD'S, a/k/a SOCIETY OF LLOYD'S, a/k/a LLOYD'S OF LONDON, FIRST UNION NATIONAL BANK OF FLORIDA, and UNITED NATIONAL BANK,

Defendants.

MEMORANDUM OPINION

Plaintiffs Mitchell Lipcon and Irmgard Lipcon, Underwriting Members in Lloyd's of London, and their spouses, Charles Lipcon and Barbara Lipcon, bring this Complaint against Defendants Lloyd's of London, First Union National Bank of Florida, and United National Bank alleging causes of action under both Florida and federal law. Although the claims presented here have not been adjudicated under *both* Florida and federal law in one action, similar claims have been raised in numerous jurisdictions throughout the nation. Echoing the nearly unanimous conclusion reached in courts throughout the country, this Court finds that the Plaintiffs' claims are subject to a valid

and enforceable forum selection clause. Therefore, the Complaint is dismissed in its entirety and the Plaintiffs may properly present their claims in the Courts of England.

I. BACKGROUND

The Society of Lloyd's is a regulator of a market analogous to the New York Stock Exchange, and is one of the largest insurance markets in the world. Over 300 hundred syndicates, each formed to insure a broad range of risks, compete within Lloyd's for underwriting business. Investors in Lloyd's have the right to participate in Lloyd's insurance underwriting syndicates by virtue of their status as Underwriting Members ("Names"). The "Managing Agents"--those who assemble the syndicates, collect premiums from the insureds, assess the Names, manage the risks, and provide annual accounting to the Names--owe a contractual duty to the Names to manage their syndicates with reasonable care and skill. Names are not allowed to deal directly with Lloyd's; rather, each Name must designate a "Member's Agent" to handle the Name's affairs. By agreement, Members' Agents owe a fiduciary duty to their Names and are obliged to act in the sole interest of their principal Names.

To become a member of Lloyd's, a prospective Name must enter into a series of contracts, including: 1) the General Undertaking, which is a contract between the Society of Lloyd's and the Name; 2) a Members' Agent Agreement, which is a contract between the Name and the Name's chosen Members' Agent; and 3) one or more Managing Agent's agreements, which define the relationship between the Name and the Managing Agent of each syndicate the Name chooses to join.

Names deposit security via an irrevocable letter of credit issued by a Lloyd's-approved bank in favor of Lloyd's. When insurance claims exceed the available premiums, Lloyd's makes "cash calls" upon the Names responsible for those claims. If the cash calls are not paid, the Name's security can be used for that purpose. Names assume unlimited personal liability for their respective shares of the risks insured by the policies they underwrite and cannot resign from the market until all of their obligations are discharged.

Plaintiffs Mitchell and Irmgard Lipcon ("the Plaintiff Names"), along with their spouses ("the Plaintiff spouses"), issued irrevocable letters of credit in favor of the Society and Council of Lloyd's. These letters were secured, issued and confirmed by the banks which are named defendants. The syndicates in which the plaintiffs participated ultimately experienced large losses.

On November 5, 1986, Plaintiff Names signed a Revised Premiums Trust Deed and General Undertaking, which included a provision that required litigation to take place in the courts of England. The documents also stated, among other things, that:

> The purpose, in both instances, is to bring the agreements into line with ... the new Lloyd's legislation ...
>
> The new Premiums Trust Deed will incorporate some new provisions which are mainly of a technical nature, and will not affect you greatly on a day to day basis.

The Plaintiff Names claim that these statements are untrue because the forum selection clause limited litigation to the Courts of England and consequently deprived the Plaintiff Names of remedies that are available in Unites States courts but not English courts. The Plaintiff Names also allege that the forum selection clause was made with knowledge of massive unreported losses for asbestos and pollution claims. The Plaintiff Names allege causes of action under Florida securities law and unspecified "United States securities laws," see Complaint ¶¶ 135, 140, and 142, and "Federal law," id. ¶¶ 127, 130, 132, and 139.

II. LEGAL STANDARD

A court will not grant a motion to dismiss unless the plaintiff fails to prove any facts that would entitle the plaintiff to relief. Conley v. Gibson, 355 U.S. 41 (1957). When ruling on a motion to dismiss, a court must view the complaint in the light most favorable to the plaintiff and accept the plaintiff's wellpleaded facts as true. Scheur v. Rhodes, 416 U.S. 232 (1974); St. Joseph's Hospital, Inc. v. Hospital Corp. of America, 795 F.2d 948 (11th Cir. 1986).

III. FORUM SELECTION CLAUSE

The principle that choice of forum and choice of law provisions are presumptively valid is well-established. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).[1] See

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[1] "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. ... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and (continued...)

also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S.Ct. 2322, 2329 (1995). However, this presumption may be overcome by a clear showing that the forum selection and choice of law provisions are "'unreasonable, under the circumstances." M/S Bremen, 407 U.S. at 10. Choice of forum and law provisions may be found unreasonable if:

1) their formation was induced by fraud or overreaching;
2) the complaining party "will for all practical purposes be deprived of his day in court" because of the grave inconvenience or unfairness of the selected forum;
3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or
4) their enforcement would contravene a strong public policy of the forum state.

See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991).

A. Fraud or overreaching: The Plaintiff Names contend that the Defendant fraudulently procured the forum selection and choice of law clauses. Fraud will only invalidate a forum selection clause "if the inclusion of that clause in the contract was the product of fraud or coercion." Scherk v. Alberto-Culver Company, 417 U.S. 506, 519 (1974) (emphasis added). Other courts examining similar challenges to this same forum selection clause have

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[1] (...continued)
resolved in our courts." M/S Bremen, 407 U.S. at 9.

concluded that the claims must fail.[2] See, e.g., Riley v. Kingsley Underwriting Agencies, Ltd., 969 F. 2d 953, 960 (10th Cir.) cert. denied, 506 U.S. 1021 (1992) (upholding forum selection clause because the Plaintiff did not plead that the specific choice provisions at issue were obtained by fraud); Haynsworth v. Lloyd's of London, 933 F.Supp. 1315, 1322 (S.D. Tex. 1996) (rejecting allegation of fraud because Plaintiffs failed to allege that they were "tricked into signing the forum selection clause").

The Plaintiff Names allege that the Defendant fraudulently procured their consent to the forum selection clause by stating that the purpose of the General Undertaking is "to bring the agreements in line with [] new Lloyd's legislation," and that the "new provisions [] are mainly of a technical "new provisions [] are mainly of a technical nature. However, these statements merely indicate that the Plaintiff Names were fraudulently induced into signing the General Undertaking, not specifically the forum selection and choice of law clauses. Even if the court were to conclude that the Plaintiff Names specifically relied on these statements in agreeing to the forum selection clause, as opposed to agreeing to the entire General Undertaking, the Plaintiff Names' claim would still fail. As stated by another court addressing a motion to dismiss:

> [t]he complaint's fatal deficiency is its lack of evidence demonstrating a link between Lloyd's

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[2] Other courts, in upholding this same forum selection clause, specifically noted that the Plaintiffs did not allege fraud. See Allen v Lloyd's of London, 94 F.3d 923, 928 (4th Cir. 1996); Shell v. R.W. Sturge, Ltd., 55 F.3d 1227 (6th Cir. 1995); Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1363 (2d Cir.), cert. denied, 114 S.Ct. 385 (1993).

knowledge relating to asbestosis claims and other long-tail liabilities and its intentional use of the choice clauses to preclude Plaintiffs from bringing valid securities law claims against Lloyd's.

Tufts v. The Corporation of Lloyd, No. 95-3480, 1996 U.S. Dist. LEXIS 12606 at *15 (S.D. N.Y. August 12, 1996) (finding no evidence that the inclusion of the forum-selection clause was an intended part of a scheme to defraud). The Court further concludes that it is not unreasonable to enforce the forum selection clause. See id. *18 (concluding that, the Plaintiffs could and should have examined the forum selection clauses carefully, "especially given the unlimited personal liability they assumed with the investments"); Bonny v. Society of Lloyd's, 3 F.3d 156, 160 (7th Cir. 1993), 114 S.Ct. 1057 (1994) ("a party to a contract has an obligation to read its provisions .... Nothing excuses the plaintiffs for not being aware of the substantive provisions of English law that the forum selection clause incorporates into their agreement") ; McDade v. Nationsbank of Texas, N.A., No. 94-3714, 1995 U.S. Dist. LEXIS 21095 at *5-7 (S.D. Tex. June 28, 1995) (assuming that Plaintiff is a "sophisticated business individual capable of either understanding the choice of law and forum selection clauses in the General Undertaking or capable of obtaining legal representation to assist him in understanding the document prior to his signing"). See also Dayhoff, Inc. v. H.J. Heinz Co., 86 F.3d 1287 (3d Cir. 1996), cert. denied. --- U.S. ---, 117 S.Ct. 583 (1996) ("The parties to the Agreements were sophisticated business people and there is no indication that Plaintiff was not aware, or could not have made itself aware, of the consequences that would result from including the forum selection clauses in the Agreements ...").

Plaintiff Names rely heavily on Leslie v. Lloyds of London, No. 90-1907, 1995 WL 661090 at *21 (S.D. Tex. August 20, 1995), in which one court in the Southern District of Texas concluded that the Plaintiff's accession to the forum selection clause was the product of fraud. In Leslie, the court found that the Defendant's committed fraud by failing to disclose material facts, including certain enhanced insurance risks and the effect of Lloyd's recently-obtained qualified immunity from civil liability from suits by Names in English courts. Id. See also Lloyd's Act, 1982, ch. 14 (Eng.). However, the court also found that the Names' reliance on Lloyd's assurances was unreasonable, a defect that was not fatal because Texas law does not require reasonable reliance on misrepresentations and nondisclosures. Id. at *22. Even applying the Leslie analysis, this Court must uphold application of the forum selection clause because reasonable reliance is an essential element of a fraudulent inducement claim under Florida law. See Avila South Condo. Ass'n, Inc. v. Kappa Corp., 347 So.2d 599, 604 (Fla. 1977); Avila South Condo. Ass'n, Inc. v. Kappa Corp., 347 So. 2d 599, 604 (Fla. 1977); Peninsular Fla. dist. council v. Pan Am. Inv., 450 So.2d 1231, 1232 (Fla. 4th DCA 1984) ("When fraud in the inducement is alleged, plaintiff need not plead that he was precluded from discovering the truth as to misrepresented facts, provided that the complaint alleges reasonable reliance on material [mis]representations of existing fact"). See also Tufts, 1996 U.S. Dist. LEXIS 12606 at *20 (refusing to follow Leslie because New York law requires reasonable reliance).

B. Denial of remedy, fundamental fairness, and public policy: The Court is persuaded by the abundance of authority concluding that Names have several remedies in

England, particularly where bad faith can be shown. See e.g., Shell, 55 F.3d at 1231; Bonny, 3 F.3d at 161; Riley, 969 F.2d at 958. Furthermore, United States courts consistently have found English courts to be neutral and just forums. See e.g., Roby, 996 F.3d at 1363; Riley, 969 F.2d at 960. Finally, because remedies in England sufficiently deter British issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure, enforcement of the choice of law and forum selection clauses does not contravene public policy. See, e.g., Roby, 969 F.2d at 1365; Allen, 94 F.3d at 930.

IV. COLLATERAL ESTOPPEL

Plaintiff Names also contend that Lloyd's motion to dismiss is precluded by the decision in Leslie, No. 90-1907, 1995 WL 661090 (S.D. Tex. August 20, 1995). However, the doctrine of collateral estoppel only precludes relitigation of identical issues that were actually litigated in a prior action. I.A. Durbin, Inc. v. Jefferson National Bank, 793 F.2d 1541, 1549 (11th Cir. 1986). Because the Leslie court's decision was based on Texas law, Defendants are not collaterally estopped from litigating the reasonable reliance issue under Florida law.[3]

V. STANDING OF CHARLES AND BARBARA LIPCON

The Court notes that Charles and Barbara Lipcon never

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[3] In view of the Court's conclusion that the forum selection clause is valid and the doctrine of collateral estoppel does not apply, the Court need not reach the other issues raised in Defendant Lloyd's Motion to Dismiss.

entered into any agreement with Lloyd's. "In order to bind a non-party to a forum selection clause, the party must be 'closely related' to the dispute such that it becomes foreseeable, that it will be bound." Hugel v. Corporation of Lloyd's, 999 F.2d 206, 209 (7th Cir. 1993). Mitchell and Barbara Lipcon, anticipating benefits flowing from their spouses' membership in Lloyd's, signed letters of credit in favor of Lloyd's to ensure that their spouses would become Names. The Plaintiff spouses are thus so closely related to this dispute that their claims are also subject to the forum selection clause.[4] See Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 514 n.5 (9th Cir. 1988) ("a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses") (quoting Clinton v. Janger, 583 F.Supp. 284, 290 (N.D. Ill. 1984); Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 203 (3d Cir. 1983).

The Supreme Court's recent decision in First Options of Chicago, Inc. v. Kaplan, — U.S. —, 115 S.Ct. 1920 (1995) does not compel a contrary conclusion. In Kaplan, the Supreme Court affirmed the Seventh Circuit's decision to vacate an arbitration award against a party who had not agreed to arbitrate. The Seventh Circuit had held that even though the Kaplans had signed related contracts, the court could not compel the Kaplans to arbitrate claims made pursuant to other contracts because they had not individually signed the specific contract containing the arbitration clause. Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1516 (3d Cir. 1994). Affirming the Seventh Circuit, the

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[4] The Court notes that the Plaintiff spouses do not contend that they would not be permitted to enforce the forum selection clause in England. See Freitsch v. Refco, Inc., 56 F.3d 825, 827 (7th Cir. 1995).

Supreme Court stated that

> arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes--but only those disputes--that the parties have agreed to submit to arbitration.

Kaplan, --- U S. at ---, 115 S.Ct. at 1924 (citations omitted).

While the Plaintiffs in Kaplan did not agree to have the arbitrators decide the issue of arbitrability, here the Plaintiff Names, by signing the revised General Understanding which included the forum selection clause, agreed to have all disputes resolved in England. In addition:

> [a]t all times material hereto the spouses of Names at Lloyd's were provided the same false, fraudulent, and misleading information provided to the Names at Lloyds. ... [The Plaintiff spouses] signed documents, including notes and mortgages on their personal residences, in order to secure letters of credit in favor of Lloyd's in order for their respective spouses to join.

Complaint ¶ 7. The Plaintiff spouses had full knowledge of all information provided to the Plaintiff Names, and could only receive a derivative benefit from their financial commitment. Furthermore, Plaintiff spouses signed the letters of credit in favor of Lloyd's more than two years before the Plaintiff Names signed the Revised Premiums Trust Deed and General Understanding, and the continued existence of the (irrevocable) letter of credit was not conditioned upon the Plaintiff spouses' consent to modifications in the relationship between Lloyd's and the

Plaintiff Names. Based on the Plaintiff spouses' close relationship to the dispute, and because it was foreseeable that the Plaintiff spouses would be bound by the forum selection clause, the Court concludes that this forum selection clause is also binding on the Plaintiff spouses.[5]

DONE AND ORDERED in Chambers at Miami, Florida, this 27th day of February, 1997.

s/
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

copies provided:
Charles R. Lipcon, Esq.
One Biscayne Tower, Suite 2480
2 South Biscayne Boulevard

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[5] Dayhoff, Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1297 3d Cir. 1986), is not dispositive. In Dayhoff, the Third Circuit, relying on Kaplan, concluded that even though the corporate subsidiary had signed an arbitration and forum selection clause with another contracting party (Dayhoff), the subsidiary's corporate parents could not invoke the arbitration and forum selection clauses by reason of their corporate relationship. In addition, since the company which purchased the same corporate subsidiary (Hershey) specifically did not purchase the contracts that included the arbitration and forum selection clauses, the Court concluded that the arbitration and forum selection clause could not be enforced by Hershey against Dayhoff, but rather could only "be enforced by the signatories to those agreements." Id. at 1296. However, the Court specifically noted that where the claim of the non-contracting party that is seeking to enforce the arbitration agreement (or forum selection clause) is "directly related to, if not predicated upon," one of the contracting parties, the claim is also subject to the arbitration provision or forum selection clause. Id. at 1296-97.

Miami, FL 33131
Mitchell Lipcon Esq.
9100 S. Dadeland Blvd. #400
Miami, FL 33156
Jon W. Zeder, Esq.
2601 South Bayshore Drive, Suite 1600
Miami, FL 33133
Lewis R. Cohen, Esq.
1399 S.W. 1st Avenue, 4th Floor
Miami, FL 33130
Stephen B. Gillman, Esq.
200 S.E. 1st Street #1100
Miami, FL 33131
Sharon Wolfe, Esq.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5144

IRMGARD LIPCON, et al.,

Plaintiffs-Appellants,

v.

UNDERWRITERS AT LLOYD'S LONDON, et al.,

Defendants-Appellees.

On Appeal from the United States District
Court for the Southern District of Florida

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

RICHARD H. WALKER
General Counsel

JACOB H. STILLMAN
Associate General Counsel

ERIC SUMMERGRAD
Principal Assistant General Counsel

LESLIE E. SMITH
Senior Litigation Counsel

Of Counsel
PAUL GONSON
Solicitor

Securities and Exchange Commission
Washington, D.C. 20549

JANUARY 1998

Certificate of Interested Parties and Corporate Disclosure Statement

Counsel for amicus curiae, the Securities and Exchange Commission, hereby certifies that the following is a complete list of interested persons:

Adorno & Zeder, P.A.
Magistrate Judge Ted E. Bandstra
Cooper & Wolfe, P.A.
Lewis R. Cohen, Esq.
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
David Lawrence III, Esq.
Gallwey, Gillman, Curtis
Stephen B. Gillman, Esq.
Barbara Lipcon
Charles Lipcon, Esq.
Irmgard Lipcon
Mitchell Lipcon, Esq.
Lloyd's London
The Honorable Federico A. Moreno
Scharlin, Lanzetta, Cohen, Cobb & Ebin
Securities and Exchange Commission
Leslie Smith, Esq.
Jacob Stillman, Esq.
Eric Summergrad, Esq.
Sharon Wolfe, Esq.
Jon Zeder, Esq.

CERTIFICATE IDENTIFYING
SIZE AND STYLE OF TYPE

12 point Courier type, 10 characters per inch, is used in this brief.

[TABLES OMITTED IN PRINTING]

STATEMENT OF THE ISSUE PRESENTED

Defendant Lloyd's of London, an English company, is alleged to have violated registration and antifraud provisions of the federal securities laws in soliciting the plaintiff investors in the United States to buy its securities. The district court dismissed the plaintiffs' federal securities law case on the basis of choice of forum and choice of law provisions in agreements between Lloyd's and its investors which, taken together, would require litigation of any disputes in an English forum under English law and would preclude recovery under the United States securities laws. The question presented is:

Whether, when a foreign company has committed violations of the federal securities laws in the United States in selling its securities to American investors, the antiwaiver provisions of the federal securities laws -- which render void any agreement binding a securities purchaser to waive compliance with the federal securities laws -- prohibit a United States court from giving effect to contractual provisions that would preclude the purchasers from obtaining relief under the federal securities laws.

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission is the agency principally responsible for the administration and enforcement of the federal securities laws. This case involves the application of provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 that render void any purported waiver of a person's obligation to comply with those laws. These antiwaiver provisions state:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.[1]

These provisions are essential to the enforcement of the securities laws in that they prevent persons from avoiding their obligations under those laws through the simple expedient of requiring investors to waive their rights under those laws as a condition to engaging in securities transactions.

The far-reaching effect of the district court's holding is apparent in light of the fact that it must be assumed, for purposes of resolving the issue here, that the defendants committed the alleged securities law violations. Under the district courts holding, the purchasers would have no remedy under the federal securities laws to compensate them for their losses even if the defendants conceded the violations.

The district court's holding is consistent with decisions of several courts of appeals upholding Lloyd's choice clauses, [2] but is contrary to the position taken by a Ninth

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[1] The quoted language is from Section 14 of the Securities Act, 15 U.S.C. 77n. The parallel provision in Section 29(a) of the Exchange Act, 15 U.S.C. 78cc(a), is identical in all respects material to this case.

[2] Haynsworth v. The Corporation, a/k/a Lloyd's of London, 121 F.3d 956 (5th cir. 1997); Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996); Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d Cir.), cert. denied, 510 U.S. 945 (1993); Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993), cert. denied, 510 U.S. 1113 (1994); and Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir.), cert. denied, 506 U.S. 1021 (1992) (the " Lloyd's cases"). Cf. Shell v. R.W.

(continued...)

Circuit panel in a case now pending before that court in banc. Richards v. Lloyd's of London, 107 F.3d 1422, reh'g in banc granted, 121 F.3d 565 (9th Cir. 1997). The Commission strongly urges this Court to follow the Ninth Circuit panel decision and reverse the district court's erroneous dismissal of this action. [3] The district court's holding would seriously impair the ability of defrauded investors to obtain compensation for their losses, and would hamper the deterrent function of the federal securities laws by discouraging private actions.

STATEMENT OF THE CASE

A. The Allegations and Factual Background

This is an appeal from the dismissal of an action brought against Lloyd's [4] under the federal securities laws by four residents of the United States -- two individuals and their spouses -- on behalf of themselves and others similarly

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[2] (...continued)
Sturge, Ltd., 55 F.3d 1227, 1231 (6th Cir. 1995) (upholding choice clauses as basis for dismissing claims under Ohio securities laws.)

[3] The Commission is submitting this brief solely to address the legal issue of the applicability of the antiwaiver provisions, and takes no position on any other issue, including whether the defendants violated the registration and antifraud provisions of the securities laws.

[4] Underwriters at Lloyd's London, an unincorporated association, and the Corporation of Lloyd's, aka the Society of Lloyd's, aka Lloyd's of London, have been named as defendants. Together they are referred to herein as "Lloyd's."

situated. R5-108-1,7.[5] The case arises out of the plaintiffs' investment in the Lloyd's insurance enterprise. The plaintiffs allege that Lloyd's violated the registration requirements of Section 5 of the Securities Act, 15 U.S.C. 77e, which is actionable under Section 12(l) of that Act, 15 U.S.C. 771(l). R5-108-9, 49-50, 54-55. They also seek recovery under the antifraud provisions of Section 12(2) of the Securities Act, 15 U.S.C. 771(2), Section 10(b) of tho Exchange Act, 15 U.S.C. 78j(b), and Commission Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5. R5-108-9, 55-59, 61-63. The allegations of fraud include the failure of Lloyd's to disclose the high risks associated with asbestos and other liabilities that had been assumed without adequate reserves by the syndicates in which the United States investors were encouraged to invest. R5-108-2-3.

Lloyd's differs from a typical United States insurance company in that it does not underwrite insurance, but is composed of individual members, referred to as "Names," who underwrite insurance pursuant to rules and procedures established by Lloyd's. R5-108-11-12. Each Name must determine the amount of insurance underwriting he wishes to undertake each year, based on the amount of premiums that can be accepted on his behalf. R5- 108-24. A Name must then put up funds at Lloyds, typically a letter of credit, to support the chosen level of underwriting. R5-108-27. Although a Name limits his risk in the sense of limiting the amount of premiums which can be received during the year, the Name's actual liability is effectively unlimited and may well exceed the amount of the letter of credit. R5-108-12, 17-18, 31, 44.

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[5] "R. __ - __ refers to the volume and the docket number of the district court record.

Individual Names group together annually to form syndicates which act as joint ventures for the Names for the year. R5-108-15. This generally enables the Names to spread the risk of any particular underwriting among the various members of the syndicate, each of whom is individually responsible for his or her share of the risk. R5-108-16. Each syndicate is managed by a Managing Agent. R5-108-13. The Names are represented by Members' Agents who invite individuals to become Names and who advise their Names on syndicate selection each year. R5 108-12- 13, 14.

In order to become a Name an individual: must be interviewed by a committee in London. R5-108-24. Although each of the United States Names ultimately travelled to London before becoming a Name, agents of Lloyd's went to Florida to solicit Americans to become Names and made alleged misrepresentations concerning asbestos and other liabilities in the United States. R5-108-18-19, 33, 38, 41, 105.

Each Name was required to enter into a General Undertaking with Lloyd's and a Members' Agent's Agreement with his or her Members' Agent which contained choice of law clauses providing that the rights and obligations of the parties would be governed by English law and choice of forum clauses providing that the courts of England (or, in the case of the Members' Agent's Agreement, English arbitrators) would have exclusive jurisdiction to resolve any dispute. R5-108-7, R5-119-2-3. [6]

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[6] The General Undertaking with Lloyd's provides:

The rights and obligations of the parties arising

(continued...)

B. The District Court's Decision

The plaintiffs in this case initially claimed that Lloyd's offered and sold the plaintiff Names and similarly situated persons securities in violation of Florida's securities laws. On February 28, 1997, the district court dismissed the complaint based on the choice clauses in the agreements between the Names and Lloyd's. R4-95-1. The court held that such clauses are presumptively valid, and that the "presumption may be overcome by a clear showing that the forum selection and choice of law provisions are "'unreasonable' under the circumstances" (R4-98-5, quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972). The court held, applying one of the Bremen criteria for unreasonableness, that the Lloyd's clauses were not the product of fraud in the inducement or overreaching by Lloyd's (R4-98-6-9). And, it held, applying the remaining Bremen criteria, that enforcement of the clauses would not deny the plaintiffs a remedy, be fundamentally unfair, or contravene public policy. In that regard, the court cited

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[6] (...continued)

out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding *** arising out of or relating to such matters shall be brought in such courts***.

court of appeals decisions upholding the clauses and held:

> The Court is persuaded by the abundance of authority concluding that Names have several remedies in England, particularly where bad faith can be shown. Furthermore, United States courts consistently have found English courts to be neutral and just forums. Finally, because remedies in England sufficiently deter British issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure, enforcement of the choice of law and forum selection clauses does not contravene public policy.

(R4-98-9-10 (citations omitted)).

On March 28, 1997, the court denied the plaintiffs' motion for rehearing. R4-105-1. The court stated (R4-105-2) that it would "ensure that, for purposes of appeal, Plaintiffs have the opportunity to amend their complaint to include counts that may not have been included in the original complaint."

The plaintiffs thereafter filed a Second Amended Complaint, which added federal claims for relief, including claims under the federal securities laws, to the two Florida state law claims contained in the original complaint. R5-108. On May 9, 1997, the district court dismissed the Second Amended Complaint "for the reasons stated in the Memorandum Opinion dated February 28, 1997." R5-118-1-2.

SUMMARY OF ARGUMENT

In this case, the district court upheld the validity of forum selection and choice of law provisions entered into between the plaintiffs and Lloyd's. Those provisions, taken together, require the plaintiffs, who were solicited in the United States to purchase securities from Lloyd's, to bring any action against Lloyd's in the courts of England under English law. The district court upheld these clauses even though it is virtually certain, and other courts have recognized, that the English courts will not entertain the plaintiffs' claims under the federal securities laws. The district courts decision is contrary to the antiwaiver provisions in the federal securities laws, which render void contractual provisions that purport to deprive investors of rights under the securities laws.

The district court, and other courts that have upheld the Lloyd's choice clauses, primarily relied upon several Supreme Court cases that upheld the validity of forum selection clauses that required litigation or arbitration in foreign forums. But nothing in those cases allows a United States court to ignore the unambiguous Congressional directive in the antiwaiver provisions that United States securities laws be available to United States investors, and to enforce contractual clauses that remove the protections of those laws from persons solicited in the United States to buy securities. In fact, the Supreme Court made clear in those cases, and in others involving forum selection clauses, that even absent a specific Congressional directive as is present here it will not uphold choice provisions that result in plaintiffs being deprived of substantive statutory rights under United States law.

The courts of appeals in the earlier Lloyd's cases appeared to recognize that plaintiffs' rights under English law are more restricted than under United States law. Nevertheless, they reasoned that the rights available to plaintiffs would be sufficient to meet what they saw as the objectives of United States securities laws. But Congress has made a legislative determination that the obligations and rights in United States law are necessary to protect investors in the United States, and has expressly directed that those protections cannot be waived. It is not permissible for the courts to substitute their policy views of what laws are sufficient to protect United States investors for the choice made by Congress.

Finally, even if this Court were to conclude that United States law need not be available so long as the remedies available under English law are comparable, the remedies available to plaintiffs in this case are not comparable.

ARGUMENT

I. THE LLOYD'S FORUM SELECTION AND CHOICE OF LAW CLAUSES ARE VOID AND UNENFORCEABLE SINCE THEY OPERATE TO DEPRIVE THE PLAINTIFFS OF SUBSTANTIVE RIGHTS WHICH, UNDER PROVISIONS OF THE FEDERAL SECURITIES LAWS, CANNOT BE WAIVED.

A. The Choice of Forum and Choice of Law Clauses Violate the Antiwaiver Provisions Because, Taken Together, They Preclude Relief Under the Federal Securities Laws.

In upholding the choice of forum and choice of law clauses, the district court failed to give effect to the antiwaiver provisions in the Securities Act and Securities Exchange Act. Although the Supreme Court has held in recent cases that investors can agree to litigate their securities claims in forums other than United States courts, it has stated that securities purchasers cannot waive their substantive rights. Yet that is precisely the effect that the choice clauses will have. The choice of forum provision requires the investors here to litigate claims against Lloyd's in English courts. The choice of law provision provides that any dispute arising out of the agreement "shall be governed by and construed in accordance with the laws of England."

The effect of these provisions, taken together, is to preclude investors from obtaining relief under the United States federal securities laws. English conflict of law principles apparently preclude enforcement by an English court of the securities laws where the parties have agreed to the application of English law. The court in Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d Cir.), cert. denied, 510 U.S. 945 (1993), noted: "According to the undisputed testimony of a British attorney, neither an English court nor an English arbitrator would apply the United States securities laws, because English conflict of law rules do not permit recognition of foreign tort or statutory law." 996 F.2d at 1362.

The fact that the investors agreed to these provisions is irrelevant, since the very objective of the antiwaiver provisions is to invalidate such agreements. As the Supreme Court held in Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 230 (1987), "[t]he voluntariness of the agreement is irrelevant to this inquiry: if a stipulation waives

compliance with a statutory duty, it is void under [the antiwaiver provisions], whether voluntary or not." [7]

It is the operation of the choice clauses in tandem that runs afoul of the antiwaiver provisions. Although the Supreme Court has hold that certain choice of forum clauses, standing alone, may not violate the antiwaiver provisions, that is only so if the clause does not "'weaken [the] ability [of investors] to recover under the [securities laws]'" nor deprive investors of an "adequate means of enforcing [those] provisions." McMahon, 482 U.S. at 229-30, quoting Wilko v. Swan, 346 U.S. 427, 432 (1953) (United States arbitral forum). See Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481-482 (1989) (United States arbitral forum). In this case, the requirement that investors litigate in England, coupled with the requirement that they do so under English law, not only "weakens" the investors' ability to recover, but in fact precludes any possibility of recovery under the federal securities laws. These clauses are plainly contrary to the antiwaiver provisions and should be held void.

B. The Supreme Court Cases Relied on by the District Court Do Not Warrant Overriding Congress,' Determination, in the Antiwaiver

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[7] See e.g., Special Transportation Services, Inc. v. Balto, 325 F. Supp. 1185 (D. Kinn. 1971) (refusing to enforce contractual provision limiting buyer's remedies for misstatements by seller of securities); Allied Artists Pictures Corp. v. Giroux, 312 F. Supp. 450 (S.D.N.Y. 1970) (holding invalid corporation's agreement to forgo recovery of short-swing profits under Section 16(b) of the Exchange Act, 15 U.S.C. 78p(b)). Cf. Andrews v. Blue, 489 F.2d 367, 375 (10th Cir. 1973) (plaintiff cannot be estopped from bringing antifraud claims by contractual provisions).

Provisions, that the Securities Laws be Available to Persons Solicited in the United States to Buy Securities.

In nonetheless upholding the choice of forum and choice of law clauses, the district court and other courts mistakenly have relied on certain Supreme Court cases in which the Court upheld international choice of forum provisions. The Bremen v. Zapata Off-Shore Co., 407 U.S. at 15 ("[I]n the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside."); Scherk v. Alberto-Culver Co., 417 U.S. 506, 519-20 (1974) ("[W]e hold that the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced * * *"); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985) ("The Bremen and Scherk establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions."). See also Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991)(domestic choice of forum provision).

Specifically, the courts have looked to the Supreme Court's statement in The Bremen that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought." 407 U.S. at 15. They have then looked to whether the Lloyd's clauses would contravene what they term the public policy "incorporated into" the antiwaiver provisions. In so holding, they have treated the antiwaiver provisions as merely reflecting a Congressional direction to the courts to decide whether "the public policies incorporated into" the securities laws would be undermined.

Roby, 996 F.2d at 1364; accord Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993), cert. denied, 510 U.S. 1113 (1994) concluding that the English courts will provide "sufficient," albeit more restrictive, remedies to investors, the courts have held that United States public policy is not contravened by the choice of forum and choice of law clauses. This was precisely the approach taken by the district court below.

The antiwaiver provisions, however, are not simply an expression of public policy that favors United States securities laws unless other comparable laws are available. Rather, they are an express and unequivocal directive that the rights and obligations under the securities laws cannot be waived. This determination has been made by Congress, and the courts are not free to substitute their own public policy determinations.

Nothing in the Supreme Court cases on which the district court and other courts rely allows a United States court to ignore an unambiguous Congressional directive that United States law be available to United States investors. Indeed, only one of those cases, Scherk, even involved such an express Congressional directive. In Scherk, the Court upheld a contractual provision requiring arbitration of securities claims in a foreign forum. But in so doing, the Court specifically noted that the case did not present a situation where an arbitration agreement designating "arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction" (417 U.S. at 519 n.13), since the parties' agreement specified that it would be construed in accordance

with Illinois law. [8] As the Court later explained in McMahon, in upholding comparable domestic arbitration agreements:

> The decision in Scherk thus turned on the Court's judgment that under the circumstances of that case, arbitration was an adequate substitute for adjudication as a means of enforcing the parties' statutory rights. Scherk supports our understanding that Wilko [v. Swan, 346 U.S. 427 (1953)] must be read as barring waiver of a judicial forum only where arbitration is inadequate to protect the substantive rights at issue.

McMahon, 482 U.S. at 229. Here, in contrast, the combination of the choice of forum and choice of law clauses will totally deprive those plaintiffs of their substantive rights under the federal securities laws. [9]

Rather than looking to whether the United States

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[8] With respect to the parties' agreement in Scherk to apply Illinois law, the Fifth Circuit has recently observed, even while upholding the Lloyd's choice clauses, that "[p]resumably, this meant that the parties could rely on the protections of the federal securities laws as well * * *." Haynsworth, 121 F.3d at 967.

[9] Scherk also relied on what it viewed as the need to allow parties in international transactions to eliminate the uncertain or unexpected application of a particular country's laws. 417 U.S. at 516. That concern is not present here. The Lloyd's defendants can hardly claim surprise in finding the United States securities laws to be applicable since they came to the United States seeking investment by Americans. There can be no dispute, for example, that they could be subject to law enforcement action by the Commission based on the same conduct alleged in this private action.

securities laws will be available, the courts upholding the choice clauses essentially have tried to discern whether English law is "good enough." In Roby, the Second Circuit stated:

> We believe that if the Roby Names were able to show that available remedies in England are insufficient to deter British issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure, we would not hesitate to condemn the choice of law, forum selection and arbitration clauses an against public policy.

Roby, 996 F.2d at 1365. After examining various remedies available under English law, the court in Roby determined that English law was adequate to deter deception of American investors and to induce disclosure of material information. The district court in this case accepted the Roby court's conclusion.

The courts upholding the Lloyds agreements have in essence substituted their policy views of what laws are sufficient to protect United States investors for the determination made by Congress. That result in inconsistent with Congress' clear directive in the antiwaiver provisions. This Court should refuse to enforce the choice clauses since they operate as a waiver of the plaintiffs' rights under the federal securities laws. [10]

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[10] One of the courts upholding the choice clauses, the Fourth Circuit in Allen, confused the question of the application of the antiwaiver provisions with the separate, subject-matter jurisdiction, (continued...)

II. EVEN ABSENT THE ANTIWAIVER PROVISIONS, ENFORCEMENT OF THE CHOICE CLAUSES CONTRAVENES PUBLIC POLICY.

Even if there were no antiwaiver provisions at issue here, depriving these plaintiffs of their statutory rights under the federal securities laws would contravene public policy.

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[10] (...continued)
question of the applicability of the United States securities laws to transnational activities; and, in doing so, it erroneously construed the latter principles, In addressing the latter issue, the Allen court indicated that the "disclosure" requirements of the United States securities laws do not apply to the solicitation in the United States of sales of foreign securities. The court was referring to the disclosure requirements under the proxy provisions and, possibly, the registration provisions, not to the antifraud provisions. Whatever the case may be where the sole claim is a failure to comply with disclosure requirements of the securities laws, the court's statement would not be true with respect to a claim under the antifraud provisions that misrepresentations were made in the United States.

Indeed, the cases cited in Allen (Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972), and Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir.), cert. denied, 423 U.S. 1018 (1975)), make clear that where a foreign issuer makes misrepresentations to American investors, in the course of soliciting investors to buy its securities, the United States courts have subject-matter jurisdiction. See also AVC Nederland B.V. v. Atrium Investment Partnership, 740 F.2d 148, 153 (2d Cir. 1984). Thus the court's remarks in Allen are relevant, if at all, to the registration claim in this case, but as to that claim also there is subject-matter jurisdiction. The applicability of the Securities Act's registration provisions to transnational activities is governed by the Commission's Regulation S, under which the transactions in this case are within the subject-matter jurisdiction of United States courts. See Commission Rule 901, 17 C.F.R. 230.901, and Offshore Offers and Sales (Release proposing Regulation S), Securities Act Release No. 6779 (June 10, 1988), 53 Fed. Reg. 22661, 22666, 1988 WL 239804 at *12.

The Supreme Court cases relied on by the district court and by the appellate decisions upholding the choice clauses do not dictate a different result. To the contrary, in each of those cases it was assumed for purposes of decision that United States statutory remedies would be available. In fact, the Supreme Court has stated that as a matter of public policy, wholly apart from any statutory antiwaiver provision, it would not uphold clauses that deprived persons of United States statutory remedies.

Although the courts of appeals in the earlier Lloyd's cases have characterized the Supreme Court cases an applying to both forum selection and choice of law clauses,[11] those cases in fact only involved choice of forum clauses. See The Bremen, 407 U.S. at 15 (upholding provision in a maritime towage contract that all disputes arising out of performance of the contract would be heard in London); Scherk, 417 U.S. at 519-20 (upholding requirement that United States company submit its United States securities law claims to arbitration in a foreign forum); Mitsubishi, 473 U.S. at 640 (compelled arbitration of United States antitrust claims in Japanese forum).

In none of the cases was it understood that the foreign tribunal would fail to apply United States law. To the contrary, in Mitsubishi the Court held that a United States court may not compel arbitration if persuaded that a plaintiff would not be able "effectively [to] vindicate its statutory cause of action in the (foreign] arbitral forum." Mitsubishi, 473 U.S. at 631. In Mitsubishi, the Court stressed that the record established that the foreign forum would entertain the

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[11] See Riley, 969 F.2d at 957; Roby, 996 F.2d at 1362; and Bonny, 3 F.3d at 160.

plaintiff's United States antitrust claims: "counsel for (the foreign litigant) conceded that American law applied to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan on that basis." Id. at 637 n.19.

As recently as 1995, the Supreme Court reiterated its commitment to preventing prospective waivers of statutory rights in Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322 (1995), a case involving a foreign arbitration clause in a bill of lading. Under the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1300 et seq., any clause in a bill of lading "lessening [a carrier's] liability" is void. The Supreme Court noted that it had not been established what law the foreign arbitrators would apply, and that the district court had retained jurisdiction and would have an opportunity at a later stage to ensure that the plaintiff's legitimate interest in the enforcement of COGSA had been addressed. Id. at 2329-30. Quoting Mitsubishi, the Court held:

> Were there no subsequent opportunity for review and were we persuaded that "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies ***, we would have little hesitation in condemning the agreement as against public policy."

Vimar, 115 S. Ct. at 2330 (quoting 473 U.S. at 637 n.19).

The waiver of rights threatened in Vimar is precisely what will occur here if the choice clauses are upheld.

III. EVEN IF PUBLIC POLICY WOULD ALLOW WAIVING THE PROTECTION OF UNITED STATES SECURITIES LAWS WHERE EQUIVALENT RIGHTS AND REMEDIES ARE AVAILABLE UNDER FOREIGN LAW, THOSE PROTECTIONS ARE NOT PRESENT HERE.

Even if this Court were to conclude that United States law need not be available so long as comparable-remedies are available under English law, the English law remedies available to the plaintiffs in this case are not nearly as favorable as their remedies under the federal securities laws.

English substantive law differs from the federal securities laws in a number of significant respects. For example, there is no cause of action under the laws of England for the securities registration violations in the United States. Thus, the effect of the choice of law provision is to forfeit the plaintiffs' express rights to recover for registration violations under Section 12(l) of the Securities Act. See Bonny, 3 F.3d at 162.

As to Section 12(2) -- which makes persons who sell a security liable for untrue statements, negligent or intentional, made in connection with the sale -- the plaintiffs' remedies would be severely compromised. Although English common law, as well as England's Misrepresentations Act, 1967, makes actionable certain types of misrepresentations, including negligent misrepresentations, the protections afforded are not adequate to provide the plaintiffs with remedies equivalent to what they enjoy under United States law. Specifically, Section 14 of the Lloyd's Act, 1982, immunizes Lloyd's from any claims under the

Misrepresentations Act, absent a shoving of bad faith. [12] Thus, there is no possibility that the plaintiffs could pursue the claims they have alleged against Lloyd's for negligent misrepresentation, such as are available to them under Section 12(2) of the Securities Act.

Even as to plaintiffs' Section 10(b) and Rule 10b-5 claims, English law is not substantially equivalent. Although the U.K.'s Financial Services Act, 1986, provides private remedies for fraud in connection with securities transactions, Lloyd's enjoys immunity from such liability. [13] In addition, unlike the federal securities laws in the United States,

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[12] Section 14 provides that Lloyd's shall not be liable for damages for negligence or other tort, breach of duty or otherwise, in respect of any exercise of or omission to exercise any power, duty or function conferred or imposed by Lloyd's Acts 1871 to 1982 * * *

> (a) in so far as the underwriting business of any member of the Society or the costs of his membership or the business of any person as a Lloyd's broker or underwriting agent may be affected;
>
> * * *
>
> unless the act or omission complained of --
>
> (i) was done or omitted to be done in bad faith

[13] Section 42 of the Financial Services Act exempts "[t]he Society of Lloyd's and persons permitted by the Council Of Lloyd's to act as underwriting agents at Lloyd's" from liability under the Act.

English law does not recognize controlling person liability. [14]

That the remedies available under English law are not as favorable as those available under the federal securities laws has been recognized by the courts of appeals in earlier Lloyd's cases: Roby, 996 F.2d at 1366 ("we do not doubt that the United States securities laws would provide the [plaintiffs] with a greater variety of defendants and a greater chance of success due to lighter scienter and causation requirements"); Bonny, 3 F.3d at 162 ("It is true that enforcement of the [choice] clauses will deprive plaintiffs of their specific rights under § 12(l) and § 12(2) of the Securities Act of 1933"); and Riley, 969 F.2d at 958 ("The fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement [of the choice clauses]").

In nonetheless holding English law to be good enough, the courts upholding the choice clauses have overlooked important aspects of the federal securities laws. The district court, like the Roby court, erred in giving insufficient weight to the compensatory function of private actions under the securities laws. The court in Roby characterized the purpose of private actions under the securities laws as existing "not because Congress had an overwhelming desire to shift losses after the fact, but rather because private actions provide a potent means of deterring the exploitation of American investors." Roby, 996 F.2d at 1364. The court proceeded to

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[14] The plaintiffs in this case seek to hold the Lloyd's defendants liable as controlling persons of underwriting agents and syndicates under Section 15 of the Securities Act, 15 U.S.C. 77o, and Section 20 of the Exchange Act, 15 U.S.C. 78t.

examine the deterrent effect of English law, generally ignoring remedies under the securities laws directed at compensating injured investors – remedies that would be lost if English law were to be applied.

Similarly, the court in Bonny, looked to "Policies of insuring full and fair disclosure by issuers and deterring the exploitation of United States investors," finding that the available remedies under English law would "suffice to deter deception," even though recognizing that the plaintiffs would be deprived of "their specific rights under § 12(l) and § 12(2) of the Securities Act of 1933." Bonny, 3 F.3d at 161-62. Private actions do, of course, serve a useful and necessary function in policing the securities markets, but they also serve as an important means of providing recompense to investors who have been harmed by wrongdoers. The decision below, like the other decisions upholding the clauses, largely eviscerates that latter function of the federal securities laws.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

RICHARD H. WALKER
General Counsel

JACOB H. STILLMAN
Associate General Counsel

ERIC SUMMERGRAD
Principal Assistant General Counsel

Of Counsel
PAUL GONSON
Solicitor

LESLIE E. SMITH
Senior Litigation Counsel

Securities and Exchange Commission
Washington, D.C. 20549

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